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Private Records, Sexual Activity Evidence, and
the *Charter of Rights and Freedoms*

Elaine Craig*

The Parliament of Canada has created a new regime dictating the process and admissibility criteria for private records (potentially including digital communications such as text messages, email and some social media posts) that are in the accused's possession in sexual assault proceedings. The legislation also includes new procedural requirements for applications to introduce evidence of a complainant's other sexual activity under section 276 of the Criminal Code. Several courts have concluded that various parts of these new provisions – which some have nicknamed the 'Ghomeshi Rules' – are unconstitutional. The problem with these decisions is that in each one the court has failed to properly balance the competing interests at stake. Stated most plainly, each of them overstates the impact of these provisions on the accused's right to a fair trial and understates the competing interests to be balanced in an analysis of the constitutionality of these new laws. This article confronts two problematic aspects of the assessment of the impact on the accused's rights in these cases: hyperbolic assertions about the impact of notice to the complainant on the right to cross-examination and assumptions about the impact of disclosure to the complainant on the truth-seeking function of the trial. This analysis is done, in part, through a case study of the trial transcript in *R v Ghomeshi* because several of these cases appear to have been litigated or adjudicated in the shadow of *Ghomeshi*. The article concludes with an assessment of the competing interests that must be balanced with the accused's right to a fair trial: the complainant's privacy, equality and dignity interests and the societal interest in encouraging survivors to report sexual offences.

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I. Introduction

In December, 2018 Parliament enacted Bill-C51, which included amendments to the *Criminal Code* to add a new regime dictating the process and admissibility criteria for private records in the possession of an accused in a sexual assault proceeding.¹ The legislation also includes new procedural requirements for applications to introduce evidence of a complainant's other sexual activity under section 276 of the *Criminal Code*.² These revisions were adopted in an

¹ Bill C-51, *An Act to amend the Criminal Code and the Department of Justice Act and to make consequential amendments to another Act*, 1st Sess, 42nd Parl, 2018, (assented to 13 December 2018), SC 2018, c 29 [Bill C-51].

² *Criminal Code*, RSC 1985, c C-46 ss 278.92 – 278.96 [*Criminal Code*].

effort to fill a gap in the statutory regime with respect to the admissibility of a complainant's private records, and strengthen the procedural elements of the rules governing admissibility of evidence of a complainant's other sexual activity.³ The government's objectives in enacting the amendments parallel those pursued through Canada's rape shield regime: to maintain the rights of the accused while also protecting the dignity, equality and privacy interests of complainants and promoting society's interest in encouraging sexual assault survivors to come forward.⁴

The constitutionality of these new provisions, referred to here as the section 278.92 regime, is now being assessed by lower courts across the country, and will be examined by the Supreme Court of Canada in 2021.⁵ While some courts have upheld the new regime,⁶ several others have found parts of it to be an unjustifiable infringement of the accused's *Charter* rights.⁷

The section 278.92 regime includes two changes to the *Criminal Code* that have garnered constitutional scrutiny. First, the regime creates a process for, and admissibility criteria regarding, records that are in the accused's possession and which contain personal information in which the complainant has a reasonable expectation of privacy.⁸ The process for applications to introduce these private records in the accused's possession requires that they be brought at least 7 days in advance [of trial⁹] and that they be disclosed to the complainant. The complainant has standing to make submissions on the admissibility of the records, and the right to be represented at the admissibility hearing.¹⁰

Second, the new regime adopts this same process for section 276 applications. In other words, under the section 278.92 regime complainants are to be provided with the accused's application to introduce evidence of her sexual history 7 days in advance of trial, and they have

³ Prior to the enactment of Bill C-51 this gap was addressed through a common law regime established in cases like *R v Osolin* [1993] 3 SCR 313 and *R v Shearing*, [2002] 3 SCR 333. This gap in the statutory regime was highlighted in a 2012 report from the Senate Standing Committee on Legal and Constitutional Affairs.

⁴ Factum of the Appellant, *R v JJ* 2020 BCSC 29 (leave to appeal granted: 2020 CanLII 48929) citing: *House of Commons Debates*, 42nd Parl., 1st Sess., No. 195 (15 June 2017), at 12806 (1640) *House of Commons Standing Committee on Justice and Human Rights*, 42nd Parl., 1st Sess., No. 70 (18 October 2017), at 1535, 1615; *House of Commons Debates*, 42nd Parl., 1st Sess., No 249 (11 December 2017), at 1205; *Debates of the Senate*, 42nd Parl., 1st Sess., Vol. 150, No. 182 (15 February 2018), at 1540; *Debates of the Senate*, 42nd Parl., 1st Sess., Vol. 150, No. 233 (3 October 2018), at 6417-6419.

⁵ *R v JJ*, 2020 BCSC 29 (leave to appeal granted: 2020 CanLII 48929) [*JJ*].

⁶ See e.g. *R. v. C. C.*, 2019 ONSC 6449; *R. v. A.C.*, 2019 ONSC 4270; *R v Whitehouse* 2020 NSSC 87; *R v FA* 2019 NCJ 391.

⁷ See e.g. *R v AM* [2019] SJ No 303 [*AM*]; *R. v. Anderson*, 2019 SKQB 304 [*Anderson*]; *R v DLB*, 2020 YKTC 8 [hereinafter *DLB*]; *R v JS*, [2019] A.J. No. 1639 (Q.B.); *R v Reddick* 2020 ONSC 156 [*Reddick*]. In *R v ARS*, 2019 ONCJ 645 [*ARS*], *R v AM* 2020 ONSC 4541 (CanLII) [*AM* (ON)] and *JJ*, *supra* note 3 the courts found that the provisions were only constitutional if the accused was permitted to bring the application once the complainant had testified. In *JJ*, *supra* note 5 Justice Duncan stipulated that the application was to be brought before cross-examination, and confined her reasoning to applications to rely on private records in the possession of the accused. In *ARS*, *ibid* Justice Breen stipulated that the applications could be brought at any time. He read down the provision to eliminate the 7 day notice requirement for applications to introduce either section 276 evidence or private records in the possession of the accused. Justice Christie reasoned similarly in *AM* (ON).

⁸ *Criminal Code*, *supra* note 2, s. 278.92.

⁹ Some courts (see e.g. *AM* (ON) *supra* note 7) have argued that the provision's wording suggests that the 7 day notice period does not mean 7 days in advance of trial but rather 7 days in advance of the admissibility hearing. For a compelling rejection of this interpretation of the provision see *R v MS*, [2019] OJ No 4866 at para 98 – 100.

¹⁰ *Criminal Code*, *supra* note 2 ss 278.93 – 278.94.

the right to make submissions on the admissibility of this evidence, either themselves or through their legal counsel.

The main challenge to the constitutionality of the section 278.92 regime is the assertion that the provisions violate the accused's fair trial rights (primarily under section 7 of the *Charter*¹¹) by disclosing these applications to complainants in advance of trial. While courts have focussed on different aspects of the regime, in nearly all of the cases which have found a violation of section 7 of the *Charter* the determination that the regime or parts of the regime are unconstitutional is related to the impact on the accused's fair trial rights caused by providing complainants with knowledge of the records or section 276 evidence in advance of trial. The problem with these decisions is that they fail to properly balance the competing interests at stake. Stated most plainly, each of them overstates the impact of these provisions on the accused's right to a fair trial and understates the competing interests to be balanced in an analysis of the constitutionality of this regime.

A Note About 'Records'

The new regime relies upon the same provision of the *Criminal Code*, section 278.1, to define "record" that is used to define record for purposes of the section 278 third-party record regime: "any form of record that contains personal information for which there is a reasonable expectation of privacy".¹² Several courts have recognized that record, for purposes of the new regime, may include digital communications such as text messages, emails, and social media posts.¹³ This makes sense. Courts have accepted that the scope of records included in section 278.1 in relation to third-party records applications include digital communications, if the communications contain content in which the complainant has a reasonable expectation of privacy.¹⁴ It would be incoherent for the same provision of the *Criminal Code* to define the same record differently depending on its possessor.

¹¹ While defence counsel have invoked both section 7 and section 11 of the *Charter*, and some courts have found violations under both provisions (see e.g. *DLB*, *supra* note 7; *Anderson*, *supra* note 7; *Reddick*, *supra* note 7), most courts have focussed the analysis on section 7 given that many of the rights explicitly protected under section 11 are included in the principles of fundamental justice under section 7 (see e.g. *ARS*, *supra* note 7; *JJ*, *supra* note 5.)

¹² *Criminal Code*, *supra* note 2, s. 278.1. The third-party records regime creates a procedure, and restraint on the ability of the accused, to subpoena a complainant's private records from a third-party.

¹³ See e.g. *R v. RMR* 2019 BCSC 1093 at para 26; *R v Tanasijevic*, [2020] O.J. No. 566.

¹⁴ See e.g. *R. v. Taseen*, [2017] O.J. No. 6580 at para 34 (concluding that the accused's request that the Crown disclose digital communications between the complainant and a third-party was subject to the third-party records regime); *R. v. Moskalyk*, [2017] O.J. No. 5749 (defence counsel initially included Facebook posts in a third-party records application but the complainant subsequently consented to their disclosure); *R. v. Z.N.*, 2018 ONCJ 501 at para 5 (accepting Crown's concession that the complainant's text messages should not have been disclosed to the accused without a section 278 application); *R v Ghomeshi* 2016 ONCJ 155 (CanLII) (defence counsel brought a third-party records application to obtain emails between the complainants).

Courts have been more divided as to whether complainants have a reasonable expectation of privacy in digital communications between themselves and the accused.¹⁵ This issue was not explicitly addressed in the decisions that have found the new regime unconstitutional. In some of these cases it was not relevant,¹⁶ and in others the court impliedly conceded that communications between the complainant and the accused do constitute records for the purposes of the section 278.92 regime.¹⁷ It is assumed here that communications between the complainant and the accused can, depending on their content, constitute records.¹⁸

...

Determining the constitutionality of the section 278.92 regime requires assessing whether it strikes a just balance between the impact on the accused's right to a fair trial and the other constitutional interests the regime seeks to protect. This is a difficult assessment – one which requires careful excavation of the underlying interests. An examination of lower court decisions which have considered the constitutionality of these provisions suggests further excavation is required.

The remainder of this article proceeds as follows. Part II assesses the impact that the new regime will have on an accused's right to a fair trial. This requires confronting two problematic aspects of the assessment of the impact on the accused's rights in these cases: hyperbolic assertions about the impact of notice to the complainant on the right to cross-examination and; assumptions about the impact of disclosure to the complainant on the truth-seeking function of the trial. This analysis is done, in part, through a case study of the trial transcript in *R v Ghomeshi* because several of the section 278.92 cases appear to have been litigated or adjudicated in the shadow of *Ghomeshi*. Part II also considers and rejects the conclusion that this regime violates the accused's right against self-incrimination.

Part III turns to the other side of the calculus: the additional constitutional interests that the section 278.92 regime seeks to protect. The constitutionality of the section 278.92 regime turns on whether the provisions strike a just balance between an accused's fair trial rights and the complainant's dignity, equality, and privacy interests, along with broader societal interests in

¹⁵ Digital communications between complainant and accused were or could be records: *R v MS*, [2019] OJ No 4866; *R v TA*, [2020] O.J. No. 1831. Digital communications between the complainant and accused not considered records: *R. v WM* 2019 ONSC 6535; *R. v Mai* 2019 ONSC 6691; *R v AM* [2020] OJ No 1345.

¹⁶ For example, in *Reddick*, *supra* note 7 the evidence at issue came within the scope of section 276. It had nothing to do with digital communications between the complainant and the accused.

¹⁷ For example, in several of these cases (*JJ*, *supra* note 5; *Anderson*, *supra* note 7; *AM*, *supra* note 7) the Court pointed to the cross-examination in *R v Ghomeshi*, *supra* note 14 (large parts of which were based on records of digital communication between the complainant and the accused) as an example of a defence that would be lost to the accused under the new regime. In some of these cases the records at issue were digital communications between the complainant and the accused (see e.g. *JJ*, *supra* note 5 (digital communications containing nude photographs of the complainant; *AM*, *supra* note 7 (text messages from complainant to a third party); *Anderson*, *supra* note 7 (digital communications)).

¹⁸ This assumption is premised largely on the basis of the analysis developed by Justice Chapman in *MS*, *supra* note 9 at para 50. Justice Chapman identified 16 factors, based on privacy law, that should inform judicial assessments of whether a record is within the scope of section 278.1.

ensuring a fair and humane process. To date, cases concluding that the regime, or parts of it, are unconstitutional have failed to properly recognize the competing constitutional interests at issue. Part III explores three ways in which this tends to occur: a failure to recognize the competing principles of fundamental justice; a failure to properly assess the privacy interest at stake; and an unfounded conclusion that these legislative measures in place in Canadian sexual assault law to protect complainants can be reduced to limits on the admissibility of evidence of sexual history or private records. To the contrary, the section 278.92 regime provides important substantive *and* procedural protections to sexual assault complainants.

II. Assessing the Impact of the 278.92 Regime on the Accused's Right to a Fair Trial

There are two problematic trends related to the assessment of the impact on the accused's rights in the cases which have found the regime, or part of the regime, unconstitutional. First, in some cases courts appear to have overstated the impact on the accused's right to full answer and defence – primarily by asserting that disclosing these applications to complainants prior to trial is entirely novel or that it will “eviscerate”¹⁹ the accused's right to cross-examination. These assertions unfairly compromise the balancing exercise required. Second, the assessment of the impact on the accused's fair trial rights in several cases appears to be premised on a questionable assumption about the impact that the regime will have on the truth-seeking function of the trial.

i. Overstating the impact of the 278.92 regime on the right to cross-examination

There are two ways in which some courts are overstating the impact of the section 278.92 regime on the accused's right to cross-examination. The first involves the assertion that providing complainants with advance notice of evidence the defence intends to rely upon for impeachment purposes is novel. The second involves the unsubstantiated assertion that granting a complainant access to these applications will render meaningless, or eviscerate, defence counsel's ability to cross-examine her.

Consider first the novelty claim. Some courts have relied upon the erroneous conclusion that providing complainants with notice of aspects of the accused's case, and granting them standing to make submissions on the admissibility of private records or sexual history evidence that the defence seeks to rely upon, are “unprecedented”²⁰ and “entirely new innovation[s]”.²¹ This is incorrect.

Complainants already have standing in proceedings both to determine the production of private records to the accused, and to address the use of private records already in the possession of the accused.²² Section 278.3 of the *Criminal Code* mandates that a complainant be served with

¹⁹ *Anderson*, *supra* note 7 at para 21.

²⁰ See e.g. *AM*, *supra* note 7 at para 24. Judge Henning stated that “[t]he making of a complainant a party to a hearing to determine the use of such material is innovative.”

²¹ *Ibid* at para 23

²² *Criminal Code*, *supra* note 2 section 278.3; *Shearing*, *supra* note 3 at para 102.

any application by an accused to produce third-party records in which she has a reasonable expectation of privacy.²³ Complainants have a statutory right to appear and make submissions at any hearing regarding an application by the defence to obtain third-party records in which she has a reasonable expectation of privacy. Complainants also have standing in *voir dire*s to determine the admissibility of records in which they have a privacy interest. The Supreme Court implicitly recognized this in *R v Shearing*.²⁴ Subsequent courts have followed this procedure.²⁵ As Justice Breen observed in *R v ARS*: “third parties are routinely afforded standing in criminal proceedings when their rights are engaged.”²⁶ Granting complainants notice of an application and standing on the admissibility of her private records is not unprecedented. Our assessment of the impact of the section 278.92 regime on the rights of the accused should not be premised on the understanding that this is an entirely new circumstance.

The conclusion that the section 278.92 regime is unconstitutional is primarily premised on the detrimental effect that notice and disclosure to the complainant could have on an accused’s right to cross-examination.²⁷ The primary detrimental effect identified is the risk that the complainant will modify her testimony in light of what she learns from the application.²⁸ This is a critically important concern and one that must be grappled with in analyzing the constitutionality of the section 278.92 regime. However, tackling this issue requires contending with the fact that complainants already had notice, disclosure, and standing with respect to an accused’s efforts to obtain third-party records. They also already had informal notice and some disclosure regarding any evidence of their other sexual activity that the accused seeks to rely upon.²⁹

In some cases, courts have grappled with this reality - typically by attempting to distinguish between these other/prior regimes and the section 278.92 regime. Not all of these attempts are compelling. For instance, in *R v DLB*, in considering the records in the possession of the accused aspect of the regime, Judge Ruddy suggests that the complainant’s privacy and equality interests are of a different, lesser nature than would be the case with respect to third-party records (and section 276 evidence).³⁰ He concludes that records in the possession of the accused are “dramatically less” likely to be highly sensitive and private than are third-party records and section 276 evidence.³¹ This is unconvincing. First, some of the records in the accused’s possession may be third-party records for purposes of section 278. In other words, the regime captures third-party

²³ *Criminal Code*, *ibid*.

²⁴ *R v Shearing*, *supra* note 3 at para 102. In *Shearing* the complainant’s objection to cross-examination based on the contents of her diary resulted in a *voir dire* in which her lawyer made extensive submissions on its use.

²⁵ Courts have also recognized that sexual assault complainants are to be given notice and granted standing to make submissions on the use of private records obtained unlawfully by the accused or through a civil proceeding *C(S) v S(N)*, 2017 ONSC 353. See Daniel Brown and Jill Witkin, *Prosecuting and Defending Sexual Offence Cases*, (Emond Publishing: Toronto, 2018) at p 309.

²⁶ *Supra* note 7 at para 82

²⁷ See e.g. *AM*, *supra* note 7 at para 36; *ARS*, *supra* note 7 at para 78

²⁸ See e.g. *Anderson*, *supra* note 7; *ARS*, *supra* note 7; *DLB*, *supra* note 7; *JJ*, *supra* note 5; *AM*, *supra* note 7.

²⁹ *R. v. Darrach*, [2000] 2 S.C.R. 443 at para. 55: “The Crown as well as the Court must get the detailed affidavit one week before the *voir dire*, according to s. 276.1(4)(b), in part to allow the Crown to consult with the complainant.”

³⁰ *Supra* note 7 at paras 72-77.

³¹ *Supra* note 7 at para 77.

records that happen to be in the accused's possession. Second, there are records explicitly included in the third-party records regime, such as employment and education records,³² which could not reasonably be characterized as more sensitive, or more private, than some of the records in the possession of the accused that are captured by the section 278.92 regime.

Compare, for example, school attendance records not in the possession of the accused (and thus covered under the third-party records regime) with emails sent from the complainant to the accused's mother discussing the complainant's mental illness diagnosis, intellectual disability, or the physical abuse she suffered as a child. Assume the accused's mother has provided them to the accused. These emails would be covered under the section 278.92 regime. Surely emails of this nature suggest a higher order of privacy and equality interests than would typically be the case with respect to school attendance records. Moreover, they include the type of evidence that ought to be pre-screened because it is sometimes relied upon to discredit complainants on the basis of problematic social assumptions about women and gender-based violence - assumptions about the lack of credibility or reliability of women with mental illness, disability or histories of abuse.³³ Given the high likelihood that a complainant and an accused are known to each other, the possibility that an accused is in possession of such highly personal, sensitive and potentially prejudicial records is not, as Judge Ruddy suggests, remote.³⁴

In *AM*, Judge Henning also attempts to distinguish the section 278 and 276 regimes from the new provisions. He suggests that the third-party records regime and the rules regarding evidence of a complainant's other sexual activity are "well understood and accepted", but asserts that there are "significant differences" between the impugned regime and the (prior) section 276 and section 278 regimes.³⁵ However, Judge Henning's reasons do not identify a difference between the impact on cross-examination of disclosure to the complainant under the section 276 and 278 regimes and the impact of disclosure to the complainant under the records in the possession of the accused provisions (which is the part of the regime he was addressing). He does not explain why the knowledge a complainant gains through the impugned proceeding creates a risk of modified testimony that is not presented by what he describes as the "well understood and accepted" third-party records and (prior) section 276 regimes. Instead, in an example of circular

³² *Criminal Code*, *supra* note 2, section 278.1.

³³ See e.g. Fran Odette, "Sexual Assault and Disabled Women" in Elizabeth Sheehy, ed, *Sexual Assault in Canada: Law, Legal Practice and Women's Activism* (Ottawa: University of Ottawa Press, 2012) 173 at 174 – 175; Lise Gotell, "The Ideal Victim, the Hysterical Complainant, and the Disclosure of Confidential Records: The Implications of the Charter for Sexual Assault Law" (2002) 40 Osgoode Hall Law Journal 251; Katherine D. Kelly, "'You must be crazy if you think you were raped': Reflections on the Use of Complainants' Personal and Therapy Records in Sexual Assault Trials" (1997) 9 Canadian Journal of Women and the Law 178; Janine Benedet and Isabel Grant, "Hearing the Sexual Assault Complaints of Women with Mental Disabilities: Consent, Capacity, and Mistaken Belief" (2007) 52 McGill Law Journal 243; Janine Benedet and Isabel Grant, "Hearing the Sexual Assault Complaints of Women with Mental Disabilities: Evidentiary and Procedural Issues" (2007) 52 McGill Law Journal 515.

³⁴ For a discussion of these harms see *R. v. C.C.*, 2019 ONSC 644 at para 78-79 (upholding the constitutionality of the new regime).

³⁵ *AM*, *supra* note 7 at para 23 and 38 – 40.

logic, he suggests that the 276 and 278 regimes are different because, unlike the impugned provisions, they do not compromise the integrity of the trial process.³⁶

In other cases, assertions about the unconstitutionality of the section 278.92 regime are made without attempting to distinguish its impact from that of regimes like the third-party records regime. For example, in *ARS* (in concluding that the provision must be read so as to not require a pre-trial application to introduce a complainant's private records or evidence of other sexual activity) Justice Breen implicitly overlooks the requirement that complainants be provided with notice and disclosure of third-party records applications. He states, "I conclude that a statutory provision that compels disclosure of impeachment material to a complainant, *in advance of cross-examination*, compromises the fairness of the trial contrary to s.7 of the *Charter*."³⁷ Third-party records obtained by accused individuals through a section 278 application, a copy of which is provided to the complainant *in advance of cross-examination*, are routinely used for impeachment purposes, as they were in *R v Ghomeshi* (discussed next).³⁸ The novelty claims articulated in several of these decisions finding the new regime, or part of it, unconstitutional are not compelling.

Now consider the claim that providing complainants with these applications in advance of trial will destroy the accused's ability to conduct a proper cross-examination. Again, the main issue under examination in all of the cases in which the provisions have been found to be unconstitutional is the new regime's potential limits on the ability of the defence to surprise a complainant during cross-examination. The key impact related to the ability to surprise identified in all of these decisions is the risk that a complainant will tailor her evidence, either knowingly or unwittingly, if she has knowledge of, and access to, these applications in advance of testifying.³⁹ There are instances in which the principles of fundamental justice require that an accused be permitted not to disclose records to a complainant prior to cross-examination.⁴⁰ However, the right to cross-examination and the right to ambush or surprise a complainant during cross-examination are not co-extensive. The former is broader than the latter. Yet, several of these cases treat them as analogous. In doing so, these cases overstate the impact of the regime on the accused's right to cross-examination.

Justice Rothery's decision in *Anderson*, for instance, explicitly conflates the right to cross-examination with the ability to surprise or ambush the complainant with evidence of which she is unaware. Justice Rothery notes defence counsel's submission that providing the complainant with these records in advance will make "[c]hallenging the credibility of the complainant...a meaningless exercise."⁴¹ Later in the decision she states that, "these procedural screening requirements eviscerate the most valuable tool available to the defence in a sexual assault trial."⁴² In *R v JJ*, Justice Duncan concluded that the requirement that applications by the accused to

³⁶ *Ibid* at para 39.

³⁷ *ARS*, *supra* note 7 at para 78

³⁸ *Ghomeshi*, *supra* note 14.

³⁹ See e.g. *DLB*, *supra* note 7 at para 64; *ARS*, *supra* note 7 at para 70, 71.

⁴⁰ One example, the one drawn out in *JJ*, *supra* note 5 might be cases in which identity is at issue. See *infra* note 132.

⁴¹ *Anderson*, *supra* note 7 at para 15.

⁴² *Ibid* at para 21.

introduce a complainant's private records be brought prior to trial would essentially eliminate the accused's ability to impeach her as a witness.⁴³

It is true that removing the ability of the accused to cross-examine the complainant with information contained in her private records or evidence of her other sexual activity, without showing these records to her in advance, will in some cases limit defence counsel's strategy. But it is hyperbolic to suggest that without the ability to ambush complainants with their private records or prior sexual history the tool of cross-examination is "meaningless".⁴⁴ Nor is it convincing to implicitly equate knowledge of this one part of the accused's case (her private records or evidence of prior sexual history) with full disclosure to the accused of all evidence and observation of all testimony, prior to him giving evidence, as was implied in *ARS*.⁴⁵

The starting assumption in criminal proceedings is that the probative value of a witness' evidence may be lost or diminished if she gains knowledge of what other witnesses have said. This is why most witnesses are excluded until after they have testified. This makes sense. To the extent possible criminal procedures should avoid the risk that witnesses will be tainted by the evidence of others, or by knowledge of aspects of the accused's case. That this makes sense, and should be maintained to the extent possible, does not mean that any and all exceptions to the criminal procedures which eliminate this risk will by definition eliminate the value of cross-examining a witness.

Some cases in which the section 278.92 regime has been found to be unconstitutional seem to assume that it is self-evident that section 278.92 will have this profound impact on the accused's right to cross-examination. Take, for example, comments made about the case invoked in many of these *Charter* decisions: *R v Ghomeshi*.⁴⁶ In *Anderson*, Justice Rothery accepted defence counsel's suggestion that the impugned amendments will prevent defence counsel from using the very tool used in *Ghomeshi* to successfully challenge the evidence of the complainants.⁴⁷ In *JJ* Justice Duncan identified *Ghomeshi* in her examination of the legislative context for Bill C-51.⁴⁸ Later in her decision, after again referencing *Ghomeshi*, she suggested that the impugned regime (and in particular the requirement of a pre-trial application) has "effectively removed" defence counsel's "ability to impeach a witness".⁴⁹ In *AM* Judge Henning accepted defence counsel's reliance on *Ghomeshi* as an example of a case in which the effect of a legitimate cross-examination would have been limited or even eliminated by the impugned regime.⁵⁰ In *ARS* Justice Breen acknowledged that the provisions appear to be Parliament's response to *Shearing*, but suggested that the amendments were "spurred by the public response" to *Ghomeshi*.⁵¹

⁴³ *JJ* *supra* note 5 at para 84.

⁴⁴ *Anderson*, *supra* note 7 at para 15.

⁴⁵ *Supra* note 7 at para 70 citing *R v White* [1999] OJ 258 at para 20.

⁴⁶ *Supra* note 14.

⁴⁷ *Anderson*, *supra* note 7 at para 15.

⁴⁸ *JJ*, *supra* note 5 at para 32-34.

⁴⁹ *JJ*, *supra* note 5 at para 84.

⁵⁰ *Supra* note 7 at para 8.

⁵¹ *ARS*, *supra* note 7 at para 23. He later suggests, at para 97, that Bill C-51 is, in fact, a codification of *Shearing*, *supra* note 3.

Many of these cases seem to have been litigated, or judicially reasoned, in the shadow of *Ghomeshi*. Given the invocation of *Ghomeshi* in so many of these cases, it is worthwhile to assess whether the impugned provisions would have in fact rendered cross-examination meaningless or significantly limited in that case. Consider, for example, the evidence of Lucy DeCoutere – one of the three complainants in *Ghomeshi*.

Defence counsel Marie Henein’s cross-examination of DeCoutere was devastating.⁵² Many of her attacks on the credibility and reliability of this witness were based on emails, photographs, and other forms of correspondence in the possession of the accused – records that would be captured by the new regime. However, careful consideration of defence counsel’s conduct of the case with respect to this witness demonstrates that a great deal of her cross-examination would have been unaffected had the section 278.92 regime been in force at the time of this trial. Far from eviscerating the accused’s right to challenge the Crown’s evidence through rigorous and full cross-examination, a review of the trial transcript in *Ghomeshi* reveals the relatively modest impact that this regime would have had on the accused’s right to full answer and defence in that case.⁵³ This is assuming that the Crown would have proceeded had it been aware of the records in the accused’s possession. Disclosure under the new regime would have given prosecutors the opportunity to re-evaluate whether there remained a reasonable likelihood of conviction.

The analysis that follows is somewhat extended. This is necessary. Assessing arguments that rely on assertions about the self-evident impact of the section 278.92 regime on an accused’s right to cross-examination requires detailed analysis of the actual impact.

Defence counsel’s cross-examination of Lucy DeCoutere can be organized into four topics: 1) DeCoutere’s increased celebrity and media attention as a consequence of this case; 2) challenges to the plausibility of DeCoutere’s version of events, including what she remembered; 3) DeCoutere’s motivation for, and feelings about, reporting *Ghomeshi* to the police; and 4) DeCoutere’s post-incident interactions with and romantic/sexual feelings towards *Ghomeshi*.

1. DeCoutere’s increased celebrity and media attention as a consequence of this case

DeCoutere, like *Ghomeshi*, was in the entertainment industry. Defence counsel asked her numerous questions about the extraordinary number of media interviews she gave regarding her allegations against *Ghomeshi*.⁵⁴ She was asked about the publicist she hired, and the way in which her photography show was purportedly promoted through interviews she gave about *Ghomeshi*.⁵⁵ Defence counsel asked her to confirm her strongly held desire that she not be included in the standard publication ban used to preserve the anonymity of sexual assault complainants: “Q. And

⁵² *Ghomeshi*, *supra* note 14 at para 132, 138.

⁵³ *R v Ghomeshi*, Trial Transcript, Volume I – III (4 February 2016) Toronto 4817 998 15-75006437 (ONCJ) [*Ghomeshi*, 4 February]; *R v Ghomeshi*, Trial Transcript, Volume I (5 February 2016) Toronto 4817 998 15-75006437 (ONCJ) [*Ghomeshi*, 5 February].

⁵⁴ *Ghomeshi* 4 February Vol II, *supra* note 53 at 3-17.

⁵⁵ *Ghomeshi* 4 February Vol III, *supra* note 53 at 83.

do you recall telling Detective Ansari, “I would like to do anything I can to avoid being part of the publication ban?”⁵⁶ She was asked to confirm that her Twitter account had gone from 1 000 to 25 000 followers during this period.⁵⁷ The probative value of these questions had nothing to do with surprising the complainant with records that were in the accused’s possession. The section 278.92 regime would have had no impact on this aspect of Henein’s cross-examination.

Defence counsel also relied upon electronic communications to raise inferences related to DeCoutere’s increased celebrity arising from this case. DeCoutere, who was a professional actor, was cross-examined about emails she sent to one of the other complainants in which she stated “Dude, with my background I literally feel like I was prepped to take this on, no shit. This trial does not freak me out. I invite the media shit”.⁵⁸ She was asked about an email in which she stated that she was excited to testify in court, which she described as “theatre at its best”.⁵⁹ Defence counsel also asked her about emails in which she expressed exhilaration that Mia Farrow had mentioned her in social media in connection with this case, and that she might be on the cover of *Vanity Fair*.⁶⁰

These emails were obtained by defence counsel through a pre-trial, third-party records application, a proceeding in which the complainant was represented by independent legal counsel.⁶¹ The complainant and her lawyer either produced these emails for defence counsel (in response to a subpoena) or would have been given copies of them if they were produced by someone else. Despite the fact that the complainant had pre-trial knowledge of these records and the accused’s argument regarding the basis for producing them, Henein was clearly able to use these emails to challenge the Crown’s case. In his decision to acquit, Justice Horkin highlighted all of this evidence. He suggested that there was a “live question” as to whether DeCoutere’s investment in serving as the public face of this case and a prominent figure in the social justice movement to resist sexualized violence “explained her questionable conduct as a witness”.⁶² The section 278.92 regime would not have limited this aspect of Henein’s cross-examination.

2. Challenges to the plausibility of DeCoutere’s version of events, including what she remembered

DeCoutere was cross-examined at length about the distinction between her highly detailed memory of events preceding the alleged attack and her memory failure with respect to the incident itself.⁶³ DeCoutere relayed details about the type of food they had at dinner prior to the incident, details of their conversation that evening and how she felt, as well as details about Ghomeshi’s

⁵⁶ *Ibid* at 81.

⁵⁷ *Ibid* at 84.

⁵⁸ *Ghomeshi* 4 February Vol III, *supra* note 53 at 82.

⁵⁹ *Ibid* at 90.

⁶⁰ *Ibid* at 87.

⁶¹ *Ghomeshi* 5 February Vol I, *supra* note 53 at 5. See also Sarah Hampson, (25 March 2016) “Court not Arbiter of Truth, Lucy DeCoutere’s Lawyer Says” online: <https://www.theglobeandmail.com/news/national/court-not-arbiter-of-truth-lucy-decouteres-lawyer-says/article29397971/> (stating in an interview that she was retained to act for DeCoutere at a third-party records application in this proceeding).

⁶² *Ghomeshi*, *supra* note 14 at para 88 – 91.

⁶³ *Ghomeshi* 4 February Vol III, *supra* note 53 at 65-66.

house.⁶⁴ However, her memory of the incident itself was less detailed, less consistent, and less vivid.⁶⁵ She was cross-examined about the fact that she told the police that she had jumbled memories of the incident.⁶⁶ Defence counsel asked her to explain why she could not remember, when reporting to the police or speaking with the media, the order in which the kissing and alleged choking and slapping had occurred.⁶⁷ Henein also challenged her repeatedly about new details DeCoutere added for the first time while testifying – details she had not told the police about kissing prior to, and following, the alleged incident.⁶⁸

Justice Horkin’s conclusion that DeCoutere was not a credible and reliable witness was clearly based in significant part on this aspect of Henein’s cross-examination:

[60] It is difficult for me to believe that someone who was choked as part of a sexual assault, would consider kissing sessions with the assailant both before and after the assault not worth mentioning when reporting the matter to the police....

[61] Ms. DeCoutere remembered and reported minute details of their date...All this was memorable and remarkable, yet she claimed to have left out the kissing and the cuddling because she thought brevity and succinctness were important. I do not accept this as a credible explanation.⁶⁹

These conclusions about the credibility and reliability of DeCoutere’s evidence were based on lines of cross-examination that would not have been limited, or even affected, had the section 278.92 regime been in force at the time of this proceeding.

3. DeCoutere’s motivation for, and feelings about, reporting Ghomeshi to the police

DeCoutere was cross-examined at length about both her motivation for reporting her allegations to the police, and her feelings about legal proceedings against Ghomeshi. She testified in direct that she was not sure when she went to the police what would happen or whether she was “going to press charges”, and that she “was not interested in any legal action”.⁷⁰ Defence counsel convincingly challenged this evidence by introducing emails to a friend, sent a few days before DeCoutere went to the police, in which she told him “I’m going to press charges to get the ball

⁶⁴ *Ibid* at 61; 65-66.

⁶⁵ It is not unusual for a victim of trauma to have detailed memories of events and circumstances surrounding the violence they endured but fragmented memories of the incident itself. See Lori Haskell and Melanie Randall, “The Impact of Trauma on Adult Sexual Assault Victims”, Justice Canada Report, 2018.

⁶⁶ *Ghomeshi* 4 February Vol II, *supra* note 53 at 20-23.

⁶⁷ *Ghomeshi* 4 February Vol III, *supra* note 53 at 57 – 59.

⁶⁸ *Ghomeshi* 4 February Vol II, *supra* note 53 at 21-23; *Ghomeshi* 4 February Vol III, *supra* note 53 at 59 – 62; 65.

⁶⁹ *Ghomeshi*, *supra* note 14 at para 60 – 61.

⁷⁰ *Ghomeshi* 4 February Vol III, *supra* note 53 at 76.

rolling.”⁷¹ DeCoutere agreed during cross-examination that she had said she had compassion and sympathy for Ghomeshi and that she wanted to protect him.⁷² Again relying on emails between DeCoutere and this friend, presumably obtained through the third-party records application, Henein challenged this evidence:

Q. You do have compassion for him?

A. Yeah, I do.

Q. You feel sympathetic towards him?

A. Absolutely.

Q. All right. And that is why you told your friend, Mr. Cutnor, on October 26th, "I want him fucking decimated."

A. Um –

...

Q. How about this one, "The guy's a shit show, time to flush"? That's said to your friend on November 13th, 2014.⁷³

Defence counsel went on to cross-examine her about emails in which she said she hoped Ghomeshi was “panic-eating” and had become really “chubby” and in which she said “Fuck Ghomeshi”.⁷⁴ Presumably the complainant was aware that defence counsel had this correspondence as a consequence of the pre-trial third-party records application at which she had standing and legal representation. This evidence also appears to have informed Justice Horkin’s decision to acquit.⁷⁵ This part of Henein’s cross-examination would not have been affected had the new regime been in force at the time of this proceeding.

4. DeCoutere’s post-incident romantic/sexual feelings towards, and contact with, Ghomeshi

One of the key facets of the defence’s case in *Ghomeshi* involved inconsistencies in DeCoutere’s statements about her feelings towards Ghomeshi, and her contact with him, following the alleged sexual assault. DeCoutere told the police and the media that she had no romantic/sexual interest in Ghomeshi after the incident in which she alleges he choked and slapped her.⁷⁶ She told the police that post-incident she only saw him in passing at industry events and that everyone knew she was not a fan of Ghomeshi.⁷⁷ Defence counsel used email and handwritten correspondence between DeCoutere and Ghomeshi to very effectively challenge this evidence. These were emails Ghomeshi had in his possession. It was clear that DeCoutere had not seen them in years and likely

⁷¹ *Ibid* at 77.

⁷² *Ibid* at 79.

⁷³ *Ghomeshi* 4 February Vol III, *supra* note 53 at 79 – 80.

⁷⁴ *Ibid* at 81.

⁷⁵ *Ghomeshi*, *supra* note 14 at para 92-93.

⁷⁶ See e.g. *Ghomeshi* 4 February Vol III, *supra* note 53 at 66, 67, 69, 91.

⁷⁷ *Ibid* at 91.

did not remember their contents. At trial, DeCoutere repeatedly maintained the assertion that she had no ongoing romantic/sexual interest in Ghomeshi until she was confronted with this contradictory evidence during cross-examination.

DeCoutere's repeated insistence that she had had no post-incident romantic/sexual interest in Ghomeshi damaged her reliability and credibility as a witness.⁷⁸ The probative value of her testimony was further diminished by the way in which her evidence of post-incident contact shifted between her statements to the police and media and her evidence at trial. Following media reports that the complainant who testified before DeCoutere had been confronted with emails between that complainant and Ghomeshi from many years prior, and on the eve of her appearance at trial, DeCoutere approached the Crown with new information about her own post-incident contact with the accused. Defence counsel raised the inference that DeCoutere intentionally misled the police and the Court about this post-incident contact and only revealed it when she realized that Ghomeshi likely had evidence of it in the form of emails she had sent to him years prior.

Henein's cross-examination of DeCoutere regarding her post-incident feelings towards Ghomeshi and her post-incident contact with him would have been adversely impacted had the defence been required to bring a section 278.92 application prior to trial seeking judicial authorization to rely on these emails. However, the question is the degree and nature of the limit that the impugned regime would have placed on this part of the accused's case. It is clear that the emails would have been admissible under the new regime, given the inconsistencies they demonstrated. It is also true that if the defence had been required to reveal these emails pursuant to a section 278.92 application, DeCoutere's evidence at trial would likely have changed. She would almost certainly not have repeated during trial her assertions to the police about minimal post-incident contact with Ghomeshi. She may not have repeated her assertion that she was not interested in him romantically (although this is less clear because she largely maintained this position even after she was confronted with these post-incident emails⁷⁹). Despite this reality, in a properly conducted proceeding, the impact that the new regime would have had on this part of the defence's case, had it been in force, would have been more modest than one might assume. It certainly would not have eviscerated or rendered meaningless the accused's right to cross-examination. Three reasons explain why this is true.

The first reason stems from defence counsel's failure to bring an application to introduce evidence of the complainant's other sexual activity pursuant to section 276 of the *Criminal Code*. Many of the emails in Ghomeshi's possession that were used by Henein to challenge DeCoutere's assertion to the police and evidence at trial that she had no ongoing romantic/sexual interest in Ghomeshi contained content that brought them within the scope of section 276. For example, Henein cross-examined her on a photo DeCoutere sent to Ghomeshi in which DeCoutere was simulating oral sex on a beer bottle:

⁷⁸ *Ghomeshi*, *supra* note 14.

⁷⁹ See e.g. *Ghomeshi* 5 February Vol I, *supra* note 53 at 73.

Q. Right. So that's the photo you send to him? That's you holding a bottle?

A. Yeah, it's a ridiculous, sexualized photo of me drinking a bottle of beer.

Q. So you sent him a photo of you fellating a bottle of beer?

A. That doesn't mean he didn't assault me, but yes I did send that picture.

Q. Well, we're getting there, just wait. Just answer this question. You agree that you send a photo of you fellating a bottle of beer ... ?⁸⁰

Henein also cross-examined the complainant on an email she sent to Ghomeshi a few hours after the incident. The email read:

Getting to know you is literally changing my mind – in a good way I think. You challenge me and point to stuff that has not been pulled out in a very long time. I can tell you about that sometime and everything about our friendship so far will make sense. You kicked my ass last night and that makes me want to fuck your brains out. Tonight. Lucy DeCoutere.⁸¹

The latter part of this email contains content that should not have been introduced without judicial authorization pursuant to a section 276 application.⁸²

Several of the post-incident emails Henein introduced had content that could be interpreted as sexual propositions by DeCoutere to Ghomeshi. She told him she wanted to “play with” him⁸³ while they were both in Banff and suggested a “chance encounter in the broom closet?”⁸⁴ She suggested “maybe dinner or perhaps I could tap you on the shoulder for breakfast?”⁸⁵ In another post-incident email she asked “Will you lemme know how you are? If there is an itch you need...um...scratching?”⁸⁶

⁸⁰ *Ibid* at 65- 66.

⁸¹ *Ghomeshi* 5 February Vol I, *supra* note 53 at 78.

⁸² Any suggestion that the last sentence in this email would not be covered by section 276 because it pertained to the sexual activity in question would be wrong. Henein clearly introduced it in order to challenge DeCoutere's evidence to the police and to the Court that she did not have any ongoing, post-incident romantic/sexual interest in Ghomeshi. While DeCoutere's email referenced their interactions on the night in question it was clearly introduced to demonstrate an inconsistency in her statements and testimony about her forward looking perspective on/feelings about Ghomeshi, *ibid* at 78-79:

Q. “Kicked my ass last night and that makes me want to fuck your brains out.” And if there's any confusion, you say “Tonight”.

A. Mmhmm, I did say that.

Q. Under oath, you have lied to His Honour. You have said I didn't want to have any romantic relationship with him. I did not pursue a relationship. I...

A. After that weekend, ma'am, after that weekend?

Q. No, I asked you and you said I never sent any sexual emails...And then under oath before His Honour, you say the one thing you didn't tell anybody is that when you walked out of the house you wanted to fuck his brains out the following night, right? That's what you said in the email, isn't that correct?

⁸³ *Ghomeshi* 5 February Vol I, *supra* note 53 at 41.

⁸⁴ *Ibid* at 44.

⁸⁵ *Ibid* at 49.

⁸⁶ *Ibid* at 64.

All of these records were introduced in order to challenge DeCoutere's evidence to the police and to the Court that she did not have any ongoing romantic/sexual interest in Ghomeshi. Lest there be any question about the sexual nature of this evidence, Henein herself characterized these communications as "sexualized", ⁸⁷ "flirtatious"⁸⁸ and "sexual".⁸⁹ These records included evidence of other sexual activity. It was the sexual nature of these communications that demonstrated the inconsistency in DeCoutere's evidence and thus made them probative.⁹⁰ It is true that section 276(4), which stipulates that sexual activity includes any communication made for a sexual purpose or whose content is of a sexual nature, was not in force when the *Ghomeshi* trial occurred.⁹¹ However, by 2016 when the *Ghomeshi* case was tried several courts had already recognized that communications of this type were included within the scope of section 276.⁹² Regardless, it is now clear, pursuant to section 276(4), that emails like these should not be introduced without an application and the requisite judicial screening under section 276 of the *Criminal Code*. Had a section 276 application been brought by defence counsel prior to trial, as was required in 2016 under the previous statutory procedure for section 276 applications, DeCoutere would have been aware of this correspondence before testifying. While she would not have had standing to make submissions on their admissibility, in a properly conducted proceeding she would have been made aware of their existence when the Crown consulted her for purposes of responding to the application. It is true that the notice provision of the new regime, had it been in force, would have removed the accused's ability to surprise her with these emails during cross-examination. The point is that if this aspect of the proceeding had been properly conducted, the element of surprise would also have been removed under the prior procedural provisions governing section 276 applications - a procedure which required a pre-trial application, a requirement that was explicitly affirmed in cases like *JJ*.⁹³

⁸⁷ See *Ghomeshi* 5 February Vol I, *supra* note 53 at 19:

Q. And the other thing you tell [the police] is that the tone of the subsequent emails were less friendly than the previous emails and less sexualized, right?

⁸⁸ *Ibid* at 41: "Q. So you send him, you agree with me, a flirtatious email saying let's get together?"

⁸⁹ *Ibid* at 79: "Q. No, I asked you and you said I never sent him any sexual emails

⁹⁰ *Ibid* at 64:

Q. But, Ms. Decoutere, you told the police, you told His Honour, you told the country you didn't have any kind of relationship with him. Then you told us, when you're confronted with some of the emails, that you were trying ... now you admit you're having a friendship with him but it wasn't sexual. Now you admit that you're sending sexual ... a picture of you with a bottle of beer, fellating it to Mr. Ghomeshi, right?

⁹¹ *Criminal Code*, *supra* note 2. Section 276(4) was added to the *Criminal Code* under the same Bill C-51 that added the section 278.92 regime.

⁹² *R v JSS*, 2014 BCSC 804 (CanLII) at para 9 (defence sought to introduce provocative texts from complainant to accused as part of a section 276 application). See also *R v Clark* 2013 ONCJ 260 at para 32; *R v Zachariou*, 2013 ONSC 6694 at paras 18-21, [2013] OJ No 4899 (QL). Shortly after Ghomeshi's trial the Newfoundland Court of Appeal, in *R v SB* (2016) NLCA 20 released a decision addressing the admissibility of sexualized text messages. The majority of the Court of Appeal agreed that the emails should not have been admitted. The issue of whether these communications fell within the scope of section 276 was accepted without dispute by all levels of court in this case.

⁹³ There is one exception: Justice Breen's decision in *ARS*, *supra* note 7 to 'read down' the notice provision not only with respect to applications regarding the admissibility of private records in the possession of the accused but also with respect to section 276 applications. This is a departure from all of the other cases addressing *Charter* challenges to the section 278.92 regime. It is also a departure from the practice that has been followed for decades in Canadian courts.

There was another important piece of correspondence that Henein used to challenge DeCoutere's credibility and reliability based on her police statements about post-incident contact and feelings: a letter written to Ghomeshi approximately two weeks after the alleged incident, in which DeCoutere told Ghomeshi that she "loved his hands".⁹⁴ Recall that DeCoutere's allegation was that Ghomeshi choked and slapped her with his hands. She told the police and the Court that she could "still feel his hands on [her] throat".⁹⁵ The letter did not contain content that would bring it within the scope of section 276. However, it likely would be considered a record in which the complainant had a reasonable expectation of privacy for purposes of section 278.92.⁹⁶ In other words, the impugned regime, had it been in force at the time, would have eliminated Henein's ability to surprise DeCoutere with this record. DeCoutere testified that she did not remember this letter until it was presented to her.⁹⁷ It seems highly likely that she would not have repeated to the Court her assertion to the police that she could still feel his hands around her throat if she had been made aware of this letter at a pre-trial application pursuant to section 278.92.

In this regard the impugned regime would have placed a limit on the accused's right to cross-examination. But again, consider the actual impact it would have had on the accused's right to use this letter to challenge the Crown's evidence. The letter would clearly be admissible under the new regime. Henein would still have cross-examined DeCoutere on her statement to the police that she could still, so many years later, feel his hands around her throat. Henein would have demonstrated the inconsistency between what she told the police and the contents of this letter - in which DeCoutere pointedly told Ghomeshi she loved his hands. DeCoutere would still have had to explain how such a document accords with what she told the police (and the media).

This raises a second reason why a requirement that defence counsel bring a pre-trial application to introduce these post-incident emails would not have significantly limited the accused's right to cross-examine this complainant: most of the inconsistencies Henein focussed on were between these records and DeCoutere's police statement.

In *JJ*, Justice Duncan suggests that "[a]t its heart, a strict reading of the timing provisions in the legislation substantially alters the traditional paradigm of confronting a witness with contradictory evidence to defend oneself."⁹⁸ Discussing the *Ghomeshi* proceeding, she asserts that "[d]efence counsel cross-examined the complainants extensively on communications they had with the accused after the alleged sexual assaults, using those communications to contradict elements of the complainants' evidence-in-chief as well as for other purposes."⁹⁹ In fact, Henein mostly used the records that the accused had kept to contradict DeCoutere's police statement, not her evidence in chief.¹⁰⁰ She repeatedly emphasized that DeCoutere gave her statement to the

⁹⁴ *Ghomeshi* 5 February Vol I, *supra* note 53 at 89.

⁹⁵ *Ghomeshi* 5 February Vol I, *supra* note 53 at 72 – 73.

⁹⁶ See e.g. *R v Quesnelle* 2014 SCC 46, para. 22; *R. v. R.M.R.*, 2019 BCSC 1093 at para 36 – 39; *MS* *supra* note 9 at para 50. But see *R v. W.M.* 2019 ONSC 6535.

⁹⁷ *Ghomeshi* 5 February Vol I, *supra* note 53 at 82.

⁹⁸ *Supra* note 5 para 82.

⁹⁹ *Ibid* at para 32

¹⁰⁰ See e.g. *Ghomeshi* 4 February Vol III, *supra* note 53 at 90:

police under oath,¹⁰¹ that she had been cautioned about making false statements to the police¹⁰², and that she had been given multiple opportunities by the police to tell them about her post-incident contact with Ghomeshi.¹⁰³ While she did assert that these inconsistencies were repeated to “His Honour”,¹⁰⁴ her focus and emphasis was on the discrepancies between these post-incident emails and DeCoutere’s assertions to the police (and the media¹⁰⁵).¹⁰⁶

In assessing her credibility and reliability on the basis of statements DeCoutere made about the nature of her contact with, and feelings towards Ghomeshi, after the alleged incident, Justice Horkins did find that DeCoutere “attempted to mislead the Court”.¹⁰⁷ However, Justice Horkin also focussed substantially on inconsistencies between her post-incident emails to Ghomeshi and her statements to the police.¹⁰⁸

Why emphasize that the cross-examination and reasons for acquittal primarily focussed not on inconsistencies between the records and DeCoutere’s evidence in chief, but rather between what the records revealed and what DeCoutere told the police? It demonstrates that, had these records been revealed to DeCoutere through a pre-trial section 278.92 application, this line of cross-examination and this judicial reasoning would not have been foreclosed. It is true that, had she been privy to these records prior to trial, the complainant would have had an opportunity prior to testifying to develop an explanation as to why she was not forthcoming with the police. But

Q. Now, when you go to the police and they question you, they specifically ask you about your subsequent contact with Mr. Ghomeshi, right?

A. Right.

...

Q. Do you see there, about six lines from the bottom you say, “For the most part, people just knew that I wasn’t a big fan of his. I did see Jian in passing after that at events or whatever.” Do you recall telling that to the police?

A. Yeah.

Q. And you were under oath when you gave that statement, right?

A. Right.

Q. All right. And then do you recall that they asked you again about what your interaction was....

See also *ibid* at 93.

¹⁰¹ See e.g. *ibid* at 90; 94.

¹⁰² See e.g. *Ghomeshi* 5 February Vol I, *supra* note 53 at 12, 77.

¹⁰³ See e.g. *ibid* at 90 – 97.

¹⁰⁴ *Ghomeshi* 4 February Volume III, *supra* note 53 at 69.

¹⁰⁵ *Ibid* at 71.

¹⁰⁶ *Ibid* at 74-76.

¹⁰⁷ *Ghomeshi*, *supra* note 14 at para 81. Notably, the records he relied upon to make this particular finding, *ibid* at para 82-84 were mostly ones that contained sexual content which would be subject to section 276 of the *Criminal Code*.

¹⁰⁸ *Ghomeshi*, *supra* note 14 at para 66 – 67:

[66] Lucy DeCoutere swore to the police that after the alleged assault in 2003 she only saw Mr. Ghomeshi “in passing”....Ms. DeCoutere was asked directly by the police interviewers to tell them everything about her relationship with Mr. Ghomeshi, before and after the alleged assault.

[67] It became clear at trial that Ms. DeCoutere very deliberately chose not to be completely honest with the police. This statement was subject to a formal caution concerning the potential criminal consequences of making a false statement. It was given under oath, an oath to tell the truth, the whole truth and nothing but the truth, not a selective version of the truth. Despite this formal caution and oath, Ms. DeCoutere proceeded to consciously suppress relevant and material information. This reflects very negatively on her general reliability and credibility as a witness....

whatever explanation she might have given would not have eliminated the probative value of these records to demonstrate that her statements to the police under oath, after having been cautioned to tell the truth, were either dishonest or unreliable.

In *JJ* Justice Duncan also asserts that the ability of defence counsel to point out to the trier of fact that a complainant's change in evidence after she gained knowledge of records following a section 278.92 application is "cold comfort to an individual charged with a serious crime."¹⁰⁹ It certainly was not cold comfort in *Ghomeshi*. Defence counsel in *Ghomeshi* very effectively challenged DeCoutere's credibility and reliability by cross-examining her on the changes and additions to her statements to police upon learning indirectly that Ghomeshi likely had emails from her which contradicted what she originally told the police. Rather than cold comfort for the accused, this shift in her story made for fertile and dramatic grounds of cross-examination - grounds that were relied upon by the trial judge in his decision to acquit Ghomeshi.¹¹⁰

There is a third reason why pre-trial disclosure of these post-incident emails from the complainant would not have limited the accused's right to cross-examination to the extent one might assume. There were inferences of two types of inconsistency at play in much of Henein's questioning about these post-incident emails. These records were ostensibly introduced simply to demonstrate inconsistencies or untruths in DeCoutere's police statement. However, in questioning her on these records Henein repeatedly emphasized not only their inconsistencies with her police statements but also the *importance* of reporting to the police any post-incident intimacy between DeCoutere and Ghomeshi. Consider, for example, this line of questioning: "Q. You didn't understand the importance that you kissed him goodbye, you didn't understand the importance of that...?"¹¹¹ Reflect, also, upon the following questions about a photograph that DeCoutere did not remember, or know existed, of her and Ghomeshi snuggling in a park the day after the alleged assault:¹¹²

Q. You didn't [understand] the importance that you spent the entire day, the entire next day with him?

A. I didn't understand because it doesn't impact that he, the fact that he assaulted me.

Q. You didn't understand the importance of the fact that you were spending a romantic day with him, you were cuddling with him, you were having brunch with him...you didn't understand the importance of that when Detective A[] asked you how that weekend played out?

...

Q. All right. And so that to you, your evidence under oath before his Honour, is that was just all vague; you didn't realize that that was important information for the police?¹¹³

¹⁰⁹ *Supra* note 5 at para 81.

¹¹⁰ *Ghomeshi*, *supra* note 14 at para 56 -57.

¹¹¹ *Ghomeshi* 4 February Vol III, *supra* note 53 at 74.

¹¹² *Ibid* at 72.

¹¹³ *Ghomeshi* 4 February Vol III, *supra* note 53 at 74.

To be clear, DeCoutere's explanation for failing to disclose this information to the police was her belief that it was not important. One might argue that Henein's follow-up questions were simply a response to this explanation. That argument would be unconvincing. Henein's questions were clearly intended to suggest that it would be unreasonable for anyone to think that post-incident contact with one's alleged abuser was anything other than critically important information for the police to be given. What inference drives the notion that this was critically important information? Underpinning the repeated assertion that this was important information for the police is the inference that intimate behavior subsequent to the date of the alleged assault is inconsistent with how one would expect someone who has been sexually assaulted to behave. This inference is evident in questioning such as the following:

Q. And so that's you cuddling Mr. Ghomeshi?

A. Yes.

Q. And that's the man you said earlier had choked and slapped you?¹¹⁴

Henein repeated this line of questioning later in her cross-examination:

Q. And you didn't tell the police about the snuggling in the park the next day, right?

A. No, 'cause it had completely slipped my mind.

Q. Slipped your mind that you were snuggling with the man you say slapped and choked you?¹¹⁵

She returned to this theme again in a set of questions about an email exchange between DeCoutere and Ghomeshi approximately three months after the alleged sexual assault:

Q....And so that's you reaching out to the man you say sexual[ly] assaulted you on July 4th, to confide in him about your feelings about your job, and to ask him for advice, right?

A. Advice. I'm not sure if I am asking for advice here anywhere.

Q. Are you confiding in him?

A. I...I am telling him a story. It's an email. It's sharing my day and what's going on.

Q. Sharing your day and what's going on with the man that had sexually assault[ed] you, right, unprompted? Right?

A. Yes.

Q. All right.¹¹⁶

¹¹⁴ *Ibid* at 73.

¹¹⁵ *Ghomeshi* 5 February Vol I, *supra* note 53 at 20.

¹¹⁶ *Ghomeshi* 5 February Vol I, *supra* note 53 at 31.

She raised the inference again in a set of questions regarding an email DeCoutere sent to Ghomeshi after she saw him at the Geminis a few months after the alleged incident:

Q. And you tell the media, CBC Radio, that he touched your throat [at the event] and after that, that was it, right?

A. That remains true.

Q. But the one thing you don't actually tell anybody is that you write to him, right? The guy you say just reminded you of sexual[ly] assaulting you?

A. Yeah, it was weird.

Q. Well, not only was it weird, it doesn't make sense right?¹¹⁷

In a later line of questions she again pursued this theme, using sarcasm to deliver her point:

Q. And when you send it to Mr. Ghomeshi you send it in an email. And you say to him, "Proof that you can't live without me?"

A. Mmhmm.

Q. Yes?

A. Yeah.

Q. That's not normalizing the situation, right? That's not making him feel comfortable? You're now not in Banff anymore, you're sending him the picture of you and Mr. Ghomeshi singing "Hit Me Baby One More Time", with the sentence, "proof that you can't live without me". Didn't you say he sexually assault[ed] you?¹¹⁸

It is true that these emails, assuming one accepts that the complainant had a privacy interest in them, would have to be disclosed to the complainant as part of the section 278.92 application process. However, once again consider the actual impact that this would have had on Ghomeshi's right to full answer and defence. First, the discrepancy demonstrated by these records was with what DeCoutere told, and did not tell, the police. Henein would still have been able to cross-examine her on the inconsistency between these records and her statement (and multiple follow-up emails) to the police, as explained in the previous paragraphs. Second, the portions of her cross-examination on these records aimed at challenging DeCoutere's credibility by triggering the inference that if Ghomeshi had actually slapped and choked her she would not have cuddled with him in the park the next day or sent him emails asking to meet up should not have been permitted. The Crown should have objected to, and Justice Horkins should have intervened to stop, any questions which were reliant for their probative value on discredited and impermissible stereotypes about how real sexual assault victims behave.¹¹⁹ Disclosure under the new regime will facilitate

¹¹⁷ *Ibid* at 38-39.

¹¹⁸ *Ibid* at 52-53.

¹¹⁹ *R v ARD*, 2017 ABCA 237 at para 58 (aff'd SCC); *R v DD* [2000] 2 SCR 275 at para 65.

the Crown's duty to protect the process from being distorted by rape mythology by enabling prosecutors to better prepare for trial.

Again, questions highlighting the inconsistency between telling the police she had very little to do with Ghomeshi following the alleged incident, and emails or photographs demonstrating the opposite, were permissible. Questions that challenged DeCoutere's explanation for these inconsistencies were equally appropriate. Several of Henein's questions *were* focussed on these inconsistencies. But her repeated and skeptically, or sarcastically, couched assertion 'and this is the same man you say sexually assaulted you' was arguably intended to trigger a stereotype that has been legally rejected.¹²⁰ Questions with this emphasis should not have been asked. Any limit that would be placed on defence counsel's inclination to ask them (by requiring that private records be screened in a pre-trial application) should not be included in a constitutional assessment of the impact that the 278.92 regime will have on an accused's right to cross-examination. If the section 278.92 regime deters defence counsel from asking these types of questions, because the element of surprise has been removed, all the better - particularly given the tenacious ability of these stereotypes to infect judicial reasoning.¹²¹

Unspecified, hyperbolic, assertions about the effect of the section 278.92 regime on an accused's ability to challenge Crown evidence results in reasoning which risks overstating the impact of the impugned provisions on an accused's right to cross-examination. Invoking *Ghomeshi* as a self-evident example of the drastic impact that the section 278.92 regime will have on accused individuals' right to cross-examination exemplifies this point. Careful and rigorous dissection of the *Ghomeshi* proceeding demonstrates the opposite: even in a case in which the accused is in possession of records the contents of which the complainant is unaware, and which will be extremely damaging to her evidence, the impact of the section 278.92 regime caused by the loss of opportunity to ambush or surprise may be relatively modest.

One further point must be addressed. The inconsistencies that Henein sought to reveal were between records in the accused's possession and DeCoutere's police statements (and media statements). Some courts have pointed out that the section 278.92 regime's impact on the right to cross-examination may be heightened when the accused seeks to establish an inconsistency between the private record and the complainant's evidence at trial.¹²² There is a concern, in other

¹²⁰ *ARD*, *ibid*

¹²¹ Despite cautioning himself against relying on "false stereotypes concerning the expected conduct of complainants" (*supra* note 14 at para 135) Justice Horkin in the very next paragraph (*ibid* at para 136), commented:

Each complainant in this case engaged in conduct regarding Mr. Ghomeshi, after the fact, which seems out of harmony with the assaultive behaviour ascribed to him. In many instances, their conduct and comments were even inconsistent with the level of *animus* exhibited by each of them, both at the time and then years later. In a case that is entirely dependent on the reliability of their evidence standing alone, these are factors that cause me considerable difficulty when asked to accept their evidence at full value.

The second two sentences of this paragraph rely on specific evidence in this case and are not problematic. However, the first sentence appears to invoke Justice Horkin's 'common sense' assumption about what type of conduct is "out of harmony" with how women will respond to being slapped, choked and hit in the context of a sexual interaction.

¹²² See e.g. *ARS*, *supra* note 7 at para 71; *DLB*, *supra* note 7 at para 66.

words, that the adverse impact on the accused's ability to properly test the complainant's evidence will be heightened in cases in which the inconsistency with the private record does not already exist (in, for example, a police statement, preliminary inquiry transcript, or other record.)

This is not a concern in cases in which the records contain evidence of other sexual activity. Defence counsel are not permitted to ask questions to elicit evidence of other sexual activity in order to establish an inconsistency with records in the possession of the accused that contain sexual content. To permit this would allow an end run around the rape shield protections. As such, in a properly conducted proceeding, the section 278.92 regime would have no impact in this circumstance.

Nor is there a well-founded concern of heightened impact, because the inconsistency has not crystalized, in cases in which the records contain non-sexual but highly sensitive and personal information - for example, records that contain information about a complainant's eating disorder, suicidality, or physical abuse as a child. In a properly conducted proceeding defence counsel would not be permitted to ask the complainant questions eliciting this type of evidence in an effort to impugn her credibility by establishing an inconsistency with a record in the accused's possession. In a properly conducted proceeding the Crown would object on the basis that the question was prejudicial and did not appear to be relevant, or the trial judge would intervene to require that defence counsel establish relevance before the witness be required to answer the question. If defence counsel could not point to an inconsistency already on the record (such as in a police statement or preliminary inquiry transcript), but rather acknowledged that he or she was asking the question in order to establish an inconsistency with records in the possession of the accused, the question would be disallowed. That is to say, in a properly conducted proceeding, defence counsel would not be permitted to ask such questions about highly sensitive information merely in an effort to establish inconsistencies – to test whether a sexual assault complainant is willing to be forthcoming in a public setting about, for example, her eating disorder, suicide attempts, or physical abuse as a child. Therefore, in a properly conducted proceeding, the section 278.92 regime would have no impact, let alone a heightened impact, in this circumstance.

This leaves records in the possession of the accused which do not contain sexual content or other quite personal information but that are included within the scope of the section 278.92 regime because they are either records enumerated under section 278.1 or non-enumerated records that contain information in which the complainant has a reasonable expectation of privacy. Think, for example, of school attendance records, or employment attendance records. Preventing the accused from impugning a complainant's credibility by attempting to establish an inconsistency between a section 278.1 record that does not contain particularly sensitive or personal information and the complainant's evidence at trial (by surprising her with it) does place a limit on the accused's right to cross-examination. In cases in which the records in the possession of the accused fall within the scope of section 278.1 but do not contain sexual or deeply personal information, and in which an inconsistency does not already exist (such as one between the record and the complainant's police statement) defence counsel should be permitted to bring the application

during cross-examination. Section 278.92 already provides for this possibility through the discretion granted to trial judges to waive the notice period.¹²³

Defence counsel who are uncertain as to whether records in the accused's possession contain this type of personal information ought to bring a pre-trial motion for direction from the Court.

Defence counsel remain free under the new regime to withhold records that do not fit within the scope of section 278.1, ask questions during cross-examination, and then introduce the records if the complainant's answers demonstrate inconsistencies. Again, defence counsel who are unclear whether a record falls within section 278.1 should bring a pre-trial motion for direction.

It should be evident from this discussion that the understandable concern in some of these *Charter* decisions that the impact of the regime is more problematic when the inconsistency does not already exist - that is to say when defence counsel hopes to establish an inconsistency through cross-examination - will not arise in many circumstances and can be addressed through the discretion granted to trial judges to waive the notice period when it does arise.

ii. *Assumptions About the Impact on the Truth-Seeking Function of the Trial*

There is an undefended assumption in some cases that prior knowledge of this part of an accused's case will inevitably diminish the credibility and reliability of a complainant's evidence. This assumption may distort conclusions about the impact that notice to complainants of private records in the accused's possession will have on the truth-seeking function of the trial. As Justice Raikes notes in *CC*, "it is debatable whether ambushing a witness [] aids or impairs the truth-seeking function of a trial."¹²⁴ That said, courts are understandably concerned that complainants who are made aware, prior to testifying, of the content of private records in the possession of the accused will "tailor their evidence"¹²⁵ in response. This is a risk. Just as it is a risk when a complainant testifies after a mistrial or a successful appeal of a conviction, and in every trial in which an accused testifies.¹²⁶ Just as it is a risk in a trial in which an investigating officer is exempted from the witness exclusion order, despite being a witness in the proceeding, so that he or she may assist the Crown, or when the accused is required to disclose aspects of their defence in a third-party records application.

Several points about this risk should be considered. First, we ought not to assume that advance knowledge of this type of evidence will always reduce the veracity or accuracy of the complainant's evidence. In *MS*, Justice Chapman suggests that "[the regime] enhances rather than

¹²³ *Criminal Code*, *supra* note 2.

¹²⁴ *R. v. C.C.*, 2019 ONSC 6449 at para 80.

¹²⁵ *ARS* *supra* note 7 at para 71.

¹²⁶ Suggesting that this too is a risk to the truth-seeking function of the trial, as a factual matter, is different from the constitutionally impermissible tactic of implying before a trier of fact that an accused's testimony should be weighed in light of the reality that he or she has testified after hearing the entirety of the Crown's case. So too is it different from suggesting that accepting this risk in the context of the accused's testimony is analogous to accepting it with respect to the complainant's testimony. Our constitutional commitment to avoiding wrongful convictions makes the tolerance for this risk, or risk assessment, different in these two circumstances. Nevertheless, as a factual matter, the analogy is apt.

detracts from the truth-seeking process. It would be unreasonable to expect a complainant, testifying about an embarrassing and personal subject matter, to respond logically, coherently and calmly when confronted with such material out of the blue.”¹²⁷ Justice Chapman notes that “private records, or evidence of sexual history, when put to a complainant with inadequate prior notice, logically invites a response that is generated by fear, humiliation, confusion or anxiety, and not one that is comprehensive and responsive, and conducive to getting at the truth.”¹²⁸

Indeed, it may be that the failure to provide notice creates a greater risk of dishonesty, obfuscation, or lack of clarity in a complainant’s evidence. This is not because women tend to lie about rape – as the stereotype suggests¹²⁹ – but because the legacy of legal discrimination against sexual assault victims and the ongoing social suspicion with which some, if not many, sexual assault complainants are viewed (especially, for example, Indigenous women, women with disabilities or those marginalized on the basis of poverty),¹³⁰ discourages victims from being open and forthcoming about any information that is likely to trigger any of the common stereotypes used to discredit survivors of sexualized violence.

Perhaps the witnesses in *Ghomeshi* did not lie about, or minimize, their subsequent communications and interactions with the accused in order to cover up or further untruthful accounts of him slapping or choking them without their consent. Perhaps the inaccuracies and omissions in their evidence arose from an understandable fear that they would not be believed if people knew that they cuddled with him the day after being strangled, or sent him flowers and intimate notes. Allowing a sexual assault complainant to reflect upon, so that she might explain, why she sent a letter espousing her love for the accused’s hands after she says she was strangled and slapped by him is much more likely to yield a comprehensive and candid response than trapping her in a lie about something she was understandably afraid or embarrassed to admit, or that she has forgotten.

If we accept that sexual assault complainants are no more inclined towards lying than other types of witnesses, then the question is straightforward. Which poses a greater risk to the truth seeking function of the trial: a process which plays on a complainant’s understandable fear and distrust of the criminal justice system by attempting to catch her in lies and omissions about private records or prior sexual activity in a high stress, anxiety provoking, and potentially humiliating cross-examination, or one that puts her on notice that she is rightly going to need to explain to the court any gaps and inconsistencies in her evidence demonstrated by the contents of such records? Presumably, in most cases it is the latter. To be clear, a ‘shift’ in one’s evidence is not by definition a threat to the truth-seeking function of the trial. It is only those shifts away from the truth that pose this threat. As Justice Moldaver recently stated in *R v Goldfinch*:

¹²⁷ *Supra* note 7 at para 104.

¹²⁸ *Ibid* at para 105.

¹²⁹ *R v AG* [2001] 1 RCS at 443.

¹³⁰ *R v Barton*, 2019 SCC 33 at para 1: “We live in a time where myths, stereotypes, and sexual violence against women — particularly Indigenous women and sex workers — are tragically common.”

[t]he s. 276 regime is designed to respect and preserve the rights of *both* complainants and accused persons by excluding evidence which would undermine the legitimacy of our criminal justice system and inhibit the search for truth, while allowing for the admission of evidence which would enhance the legitimacy of our criminal justice system and promote the search for truth.¹³¹

Like section 276, the section 278.92 regime is, to borrow from Justice Moldaver, “not a zero sum game”.¹³² The aim of the regime is to promote, not undermine, the truth seeking function of the trial. Some limits on the accused’s right to cross-examination may actually further this truth-seeking function.

Lastly, the risk to the truth-seeking function of the trial posed by a complainant’s potential shift in evidence is not the same in every case. There are limited circumstances in which it will be necessary to avoid disclosing records to a complainant in advance of her testimony. That is to say, there are circumstances in which disclosing the record to the complainant in advance of the proceeding could destroy, or dramatically reduce, its probative value. A likely, albeit very uncommon,¹³³ example would involve cases in which the identity of the accused is at issue and the record pertains to identity. In such cases trial judges have discretion under the provision to waive the notice requirement. This discretion granted to judges under the regime ought to be considered in assessing the impact on the accused’s right to cross-examination of granting complainants notice and standing.

iii. the section 278.92 regime does not violate the right against self-incrimination

The principle against self-incrimination protects accused individuals from being compelled to aid in their own prosecution.¹³⁴ One aspect of the right against self-incrimination is the ‘case to meet’ principle: accused individuals do not need to respond until the Crown has established a *prima facie* case.¹³⁵ In some section 278.92 cases courts have concluded that requiring the accused to bring a pre-trial application to introduce private records or extrinsic sexual activity evidence

¹³¹ 2019 SCC 38 at para 81.

¹³² *Ibid.*

¹³³ Identity of the accused is not frequently at issue in sexual assault trials because most sexual assaults are perpetrated by individuals who are known to the complainant, and in the rare cases involving strangers there may be DNA evidence. Nevertheless, it is clear that in those cases in which identity is at issue the element of surprise may be sufficiently important such that the discretion to waive the pre-trial notice ought to be granted. That said, in those infrequent cases in which identity is at issue the regime may not even apply. It seems unlikely that the accused will be in possession of the private records of a complainant he does not know. The uncommonness of such circumstances may explain why in *JJ*, *supra* note 5 at para 76 Justice Duncan developed a hypothetical fact situation that relied on rather unusual facts to demonstrate this potential impact on the accused’s rights. In her hypothetical a complainant alleges sexual assault by an unknown man at a costume party at which all of the men are dressed the same and wearing cartoon masks.

¹³⁴ Lisa Dufraimont, “The Patchwork Principle against Self-Incrimination under the Charter.” (2012) 57 *Supreme Court Law Review* 241. See *R v White*, [1999] S.C.J. No. 28, [1999] 2 S.C.R. 417.

¹³⁵ *R v P(MB)*, [1994] 1 S.C.R. 555 at para 36.

offends this principle of fundamental justice.¹³⁶ This issue was addressed by the Supreme Court of Canada in *Darrach* in the context of section 276 applications.¹³⁷ The Court concluded that requiring the accused to establish the admissibility of prior sexual history evidence prior to the Crown having adduced its ‘case to meet’ does not violate the right against self-incrimination. According to the Court in *Darrach*, the section 276 process does not create a legal or evidentiary burden; the accused is not obligated to bring a section 276 application to introduce other sexual activity evidence. The tactical choice to do so does not violate the principle against self-incrimination. Similarly, choosing to seek admissibility of a complainant’s private records is a tactical choice, not a legal obligation.

The courts in *JJ* and *ARS* attempted to distinguish *Darrach* on the basis that, in Justice Breen’s words, “[i]mplicit in the Court’s reasoning is a view of apprehended consent as an *affirmative defence*, independent of the prosecution’s obligation to establish the essential elements of the offence.”¹³⁸ His argument is that in cases in which the evidence is to be used to impeach a Crown witness, rather than establish an air of reality to the honest but mistaken belief in communicated consent ‘defence’, it is a violation of the ‘case to meet’ principle to require advance disclosure. He argues that the Court’s conclusion in *Darrach* only applies to an accused’s tactical burden to respond to the Crown’s case by introducing evidence to support a defence. This, he suggests, is distinct from a requirement to disclose evidence that will be used to impeach a Crown witness.¹³⁹

The Court in *Darrach* did not limit its conclusion about the relationship between the section 276 regime and the principle against self-incrimination in the manner suggested by Justice Breen. The Court stated:

The tactical pressure on the accused to testify at the *voir dire* under s. 276 is neither a burden of proof nor an evidentiary burden. It derives from his desire to raise a reasonable doubt about the Crown’s case by adducing evidence of the complainant’s prior sexual activity.... If the evidence is found to be admissible under s. 276, it may then serve to satisfy the evidentiary burden of adducing a factual basis for a defence (such as honest but mistaken belief in consent) *or to raise a reasonable doubt about an element of the offence*...(emphasis added).¹⁴⁰

Evidence of other sexual activity is admitted in sexual assault prosecutions for purposes unrelated to a ‘defence’ of consent or honest but mistaken belief in communicated consent, such as to reveal a prior inconsistent statement or a complainant’s motive to lie. The attempt in *JJ* and *ARS* to distinguish *Darrach* on this point results in a puzzling conclusion.

¹³⁶ See e.g. *ARS*, *supra* note 7; *JJ*, *supra* note 5.

¹³⁷ *Darrach*, *supra* note 29 at para 50 – 52.

¹³⁸ *ARS*, *supra* note 7 at para 65.

¹³⁹ *Ibid* at para 66.

¹⁴⁰ *Supra* note 29 at para 51.

Are these courts suggesting that an accused is required to bring a section 276 application in advance if the evidence is relevant to the ‘defence’ of honest but mistaken belief in communicated consent but not if the evidence is ostensibly probative of an assertion that the touching did not occur?

As described, the section 278.92 regime does place some limits on the accused’s right to cross-examination. However, these limits are not self-evidently substantial. In striking down the regime in *Anderson*, Justice Rothey refers to “an unencumbered cross-examination”.¹⁴¹ That is not what the *Charter* guarantees.¹⁴² The question is whether the extent and nature of these limits strike a constitutional balance when weighed with the other protected interests legislated under section 278.92. Answering this question requires careful assessment of these other protected interests.

III. The Constitutionally Protected Interests Legislated under the Section 278.92 Regime

The constitutionality of the section 278.92 regime turns on whether the provisions strike a just balance between an accused’s right to full answer and defence and the complainant’s dignity, equality, and privacy interests - along with broader societal interests in ensuring a fair and humane process. This requires a precise and nuanced assessment of the actual impact on the accused’s right to full answer and defence, which was addressed in the previous section. It also requires proper consideration of these other constitutional interests. In addition to hyperbolic assertions about the impact of the section 278.92 regime on the accused’s right to challenge the Crown’s evidence, some legal reasoning concluding that the regime, or parts of it, are unconstitutional fails to properly recognize the competing constitutional interests at issue. This tends to occur in three ways. The first involves a failure, in some cases, to fully recognize what the competing interests at stake in this *Charter* analysis are, and to recognize that these are also principles of fundamental justice and therefore must be balanced with the right to a fair trial.¹⁴³ Second, in several cases the assessment of the competing interest that is consistently identified – the complainant’s privacy - is not sufficiently contextualized, resulting in a failure to properly balance one of the regime’s central objectives.¹⁴⁴ Third, some cases wrongly conclude that the privacy, equality and dignity interests of the complainant are only engaged at the point when defence counsel seeks to adduce the evidence.¹⁴⁵ In fact, the constitutionality of both the procedural and substantive aspects of the section 278.92 regime must be assessed in light of the accused’s rights *and* the rights and interests of complainants and the public.

¹⁴¹ *Anderson*, supra note 7 at para 22.

¹⁴² *R v RV*, 2019 SCC 41 at para 40.

¹⁴³ *Anderson*, supra note 7; *AM*, supra note 7.

¹⁴⁴ *DLB*, supra note 7; *Reddick*, supra note 7; *Anderson*, supra note 7; *JJ*, supra note 5; *ARS*, supra note 7.

¹⁴⁵ *ARS*, supra note 7; *AM (ON)*, supra note 7 at para 44.

i. *The right to a fair trial is not the only principle of fundamental justice at issue*

Consider first the failure to properly identify the interests to be balanced. Section 7 of the *Charter* protects against state caused deprivations of one's liberty, if such deprivation is not in accordance with our principles of fundamental justice. The only principles of fundamental justice considered in cases like *AM* and *Anderson* are the accused's fair trial rights, as manifested through the principle against self-incrimination and the right to cross-examination. While *AM* and *Anderson* both recognize that the impugned regime aims to protect the privacy of sexual assault complainants, neither decision explicitly recognizes the complainant's privacy interest as a principle of fundamental justice that must also be weighed in determining whether the regime breaches section 7.¹⁴⁶ In addition, in determining whether the section 278.92 regime breaches section 7, neither *AM* nor *Anderson* balances full answer and defence with the complainant's dignity and equality interests or broader societal objectives like encouraging the reporting of sexual assault. For example, in *Anderson* Justice Rothey states: "the issue is the balancing of the accused's right to full answer and defence as against the complainant's privacy rights in electronic communications."¹⁴⁷ There is no discussion of the complainant's dignity and equality interests or the societal interest in encouraging the reporting of sexual violence in *Anderson*.¹⁴⁸ It is clear that the purpose of the new regime is to protect all of these interests.¹⁴⁹ It is equally clear that in the context of this legislation these are constitutionally protected interests.

The Supreme Court of Canada has repeatedly stated that in assessing the constitutionality of legislation that seeks to protect full answer and defence and sexual assault complainants, several principles of fundamental justice need to be balanced. According to the majority in *R v Mills*, an "assessment of the fairness of the trial process must be made "from the point of view of fairness in the eyes of the community and the complainant" and not just the accused."¹⁵⁰ The majority in *Mills* noted that "[t]he ability to make full answer and defence, as a principle of fundamental justice, must therefore be understood in light of other principles of fundamental justice which may embrace interests and perspectives beyond those of the accused."¹⁵¹ The majority in *Mills* also

¹⁴⁶ In *AM supra* note 7 at para 42, Judge Henning does conduct some balancing at the section 1 stage of his analysis. He suggests that the impugned regime's breach of the accused's section 7 rights is not justified under section 1, in part because there are already strong legislated protections that shield complainants from unwarranted intrusions into privacy and sexual history and that dispel improper stereotypes. This balancing should have been part of the *prima facie* breach analysis rather than the section 1 analysis. More importantly, his reasoning is not compelling. In terms of privacy intrusions, he is referring to the section 278 third-party records regime – which does not address the admissibility of a complainant's private records. In terms of the latter two – sexual history and improper stereotypes – he is referring exclusively to the section 276 regime. That there are exclusionary rules with respect to irrelevant and/or discriminatory evidence of a complainant's other sexual activity has no bearing on whether a constitutional balance has been struck with respect to the procedure and rules of admissibility regarding private records that do not contain sexual content.

¹⁴⁷ *Supra* note 7 at para 14. See also e.g. at paras 12, 18, 20, 22.

¹⁴⁸ *Supra* note 7. She again reduces the competing interest(s) to the complainant's right to privacy in her section 1 analysis: *R v AM* [2020] SJ No 31 at para 9.

¹⁴⁹ See e.g. *AM (ON) supra* note 7 at para 41.

¹⁵⁰ [1999] 3 SCR 668 at para 72 (citing *R. v. E. (A.W.)*, [1993] 3 S.C.R. 155).

¹⁵¹ *Ibid* at para 73.

stated that “under s. 7 rights must be defined so that they do not conflict with each other. The rights of full answer and defence, and privacy, must be defined in light of each other, and both must be defined in light of the equality provisions of s. 15.”¹⁵² In *R v Seaboyer*, Justice McLachlin (as she then was) observed that the principles of fundamental justice include trial fairness but also include “broader societal concerns”.¹⁵³ This was affirmed by Justice Gonthier in *R v Darrach*.¹⁵⁴ The unanimous decision of the Court in *Darrach* summarized the reasoning in this line of cases as follows: the principles of fundamental justice include not only protecting the rights of the accused but also “protecting the integrity of the trial by excluding evidence that is misleading...encouraging the reporting of sexual violence and protecting “the security and privacy of the witnesses.”¹⁵⁵ As recently observed by the Ontario Court of Appeal in *R v Sullivan*, this “internal balancing of competing *Charter* protected interests” is “required [when assessing] the constitutionality of a legislated compromise between protected interests” such as “the privacy and equality rights of sexual offence complainants on the one hand, and the right[s] of the accused” on the other.¹⁵⁶

Like the legislative regimes discussed in *Mills*, *Darrach*, and *Seaboyer*, the section 278.92 regime reflects a legislated arrangement between the privacy, equality, and dignity interests of complainants, the public interest in encouraging sexual assault victims to report, and the accused’s fair trial rights. In assessing the constitutionality of the section 278.92 regime under section 7 of the *Charter* these protected interests must be balanced. Some of the decisions striking down the section 278.92 regime failed to conduct this required internal balancing.¹⁵⁷ The failure to include an assessment of the impact on a complainant’s dignity and equality interests and on the societal interest in reducing barriers to reporting sexualized violence caused when a complainant is ambushed on the stand with records containing her private information is inconsistent with the Supreme Court of Canada’s jurisprudence on this issue and fatal to the reasoning in these cases.

¹⁵² *Ibid* at para 21.

¹⁵³ [1991] 2 SCR 577 at 603.

¹⁵⁴ *Darrach* supra note 29 at para 24.

¹⁵⁵ *Ibid* at para 25.

¹⁵⁶ 2020 333 at para 58.

¹⁵⁷ See e.g. *Anderson*, supra note 7; *AM*, supra note 7. There may be some confusion regarding the manner in which considerations of the public interest factor into a section 7 *Charter* analysis. In *Canada (Attorney-General) v Bedford*, 2013 SCC 72 at para 125 the Supreme Court of Canada observed that section 7 and section 1 ask different questions. With respect to principles of fundamental justice such as arbitrariness or vagueness, the government’s objective or the public interest is balanced at the section 1 stage of the analysis. This is not true in cases in which a public interest – such as the public’s interest in encouraging the reporting of sexual assault – is itself a principle of fundamental justice and is at issue.

- ii. *The nature of the privacy interest protected by the section 278.92 must be understood in context*

The privacy interest protected under the new regime is far-reaching. It reflects an attempt by Parliament to recognize that in many sexual assault proceedings the complainant's autonomy, and thus humanity, is at stake. As the Supreme Court of Canada noted in *Mills*, "it has long been recognized that this freedom not to be compelled to share our confidences with others is the very hallmark of a free society".¹⁵⁸

Not only is privacy the only interest identified in some cases, none of the decisions striking or reading down section 278.92 adequately contextualized, and thus properly recognized, the nature of the privacy interest that the section 278.92 regime seeks to protect. Take, for example, Justice Ahktar's assertion in *Reddick* that "there is no reason why an accused in possession of these documents should not be able to surprise a witness with them in sexual assault cases when they are able to do so in any other type of offence."¹⁵⁹ In fact, there are reasons why surprising sexual assault complainants with private documents is different than surprising other types of witnesses. The nature of the protected privacy interest under 278.92 must be assessed in relation to its context: an allegation of sexual violence. As Justice McLachlin observed in *Mills*: "the intimate nature of sexual assault heightens the privacy concerns of the victim."¹⁶⁰ Simply put, sex and all things related, are socially constructed as deeply private. The impact of an intrusion into the privacy of a sexual assault complainant will often be qualitatively worse than a similar breach with respect to the alleged victim of a fraud or theft, for example.

Moreover, the privacy protection offered by rules such as section 278.92 must be understood in light of both a legal history in which women who alleged rape were laid bare, put on trial, and often explicitly discriminated against, and the ongoing (often necessary) practice of scrutinizing to a highly granular degree every detail of a sexual assault complainant's allegation. This too makes the nature of the privacy interest different in this context. Some intrusions into the privacy of a sexual assault complainant are a necessary part of the criminal justice process. In some circumstances ensuring a full and rigorous ability to challenge the Crown's case, such as a case in which identity is at issue, will require that defence counsel be permitted to bring an application after the complainant's testimony has begun. The aim of section 278.92 is to eliminate or reduce the unnecessary intrusions, and the needless ambushes, such as those driven by a legal legacy which discriminated against women or an ongoing social reality in which attitudes continue to be informed by problematic and empirically unfounded social assumptions about sex and women (particularly marginalized women).¹⁶¹

¹⁵⁸ *Supra* note 150 at para 74.

¹⁵⁹ *Supra* note 7 at para 49.

¹⁶⁰ *Supra* note 150 at para 92.

¹⁶¹ *Supra* note 4.

In addition, understanding the nature of the privacy interest at stake requires recognition of the interconnectedness between the privacy interest protected under section 278.92 and the dignity and equality rights that the regime seeks to preserve. Discussing this relationship in the context of third-party records sought by the accused, Justice McLachlin explained that failing to protect communications between a sexual assault complainant and her doctor perpetuates the disadvantage experienced by sexual assault victims, in part due to the heightened privacy concerns they experience.¹⁶² This makes it more difficult for victims, who are often women, to seek legal recourse for the wrong/s they have suffered.¹⁶³ As a result, she explains,

the victim of a sexual assault is...placed in a disadvantaged position as compared with the victim of a different wrong. The result may be that the victim of sexual assault does not obtain the equal benefit of the law to which s.15 of the *Charter* entitles her. She is doubly victimized, initially by the sexual assault and later by the price she must pay to claim redress...¹⁶⁴

Justice McLachlin went on to note: “These concerns highlight the need for an acute sensitivity to context when determining the content of the accused’s right to make full answer and defence, and its relationship to the complainant’s privacy right.”¹⁶⁵ This equality interest is heightened for survivors whose lives have been heavily documented.¹⁶⁶ As a consequence of structural discrimination, Indigenous women, racialized women, women living with disabilities and women living in poverty are more likely to have been scrutinized through state apparatus. The more records that exist, the greater the jeopardy to privacy interests, and the higher the barriers to reporting.

Again, the scope of the accused’s fair trial rights must be interpreted in light of the privacy [and equality] interests of complainants.¹⁶⁷ The latter must be calibrated in context. This includes recognizing that the gendered nature of sexual violence will often produce a context in which an accused has access to and power over many aspects of a complainant’s private or intimate life. It also requires recognition of the increased scrutiny and corresponding documentation to which women marginalized on the basis of race, Indigeneity, disability, and poverty are subjected. With respect, there are indeed reasons why a legal process aimed at achieving a just balance between competing interests would limit an accused’s ability to surprise a complainant with her private records in a sexual assault trial but not in a criminal proceeding for a non-sexual offence.

¹⁶² *Mills*, *supra* note 150 at para 92.

¹⁶³ *Ibid* at para 92.

¹⁶⁴ *Mills*, *supra* note 150 at para 92.

¹⁶⁵ *Ibid* at para 93.

¹⁶⁶ See e.g. Karen Busby, “Discriminatory Uses of Personal Records in Sexual Violence Cases” (1996) 9:1 CJWL 148.

¹⁶⁷ *Ibid* at para 94; Kelly, *supra* note 33.

- iii. *The protected interests legislated under the sexual assault provisions of the Criminal Code are both substantive and procedural*

Some cases did recognize that the equality and dignity interests of sexual assault complainants also have a constitutional foundation and must be balanced with the accused's right to a fair trial.¹⁶⁸ Unfortunately some of these decisions still fail to assess the constitutionality of the regime, in particular the procedural parts of the regime, in light of both the accused's right to a fair trial *and* these competing interests. For example, in *ARS* Justice Breen did not recognize that these other principles of fundamental justice inform not only the admissibility criteria under the regime but also its procedural aspects. The fundamental flaw in Justice Breen's *Charter* analysis in *ARS* is captured in the following two sentences: "the complainant's constitutionally protected interests are only engaged *at the point the defence seeks to elicit such evidence*. A judicial determination of admissibility, at this point and in accordance with ss.276(2) or 278.92(2), fully protects a complainant's right to privacy and equality."¹⁶⁹ With respect, Justice Breen's reliance on the reasoning in *Shearing* as the basis for his conclusion that a complainant's interests are protected solely through the admissibility assessment is misleading. The passage from *Shearing* that he draws upon for this proposition might, on its own, support his assertion.¹⁷⁰ But once one considers the context in which the Court made this statement in *Shearing* it becomes evident that it does not support Justice Breen's conclusion.

In *Shearing* the Court was grappling with whether the accused was required to relinquish records already in his possession and then make an application for production under section 278 or whether it was sufficient to hold a *voir dire* on admissibility. The Court concluded that an admissibility *voir dire* was the appropriate process, in part because the privacy interests protected under section 278 by limiting the ability of an accused to use the state's power to produce a sexual assault complainant's private records were not at issue. The accused already had the record. It was in this context that the Court in *Shearing* made the statement that all that was required to protect the complainant's interests was an admissibility hearing.

In Justice Breen's analysis the constitutionality of the procedural aspects of the regime turns exclusively on the accused's interests and not broader societal factors or the complainant's equality and dignity interests. For example, based on his reasoning, the constitutionality of the *timing* of a section 276 application turns exclusively on the rights of the accused. He states: "it is the judicial determination of admissibility *itself* that protects the privacy interests of the witness and the broader policy concern of encouraging complainants to come forward and/or seek counselling services."¹⁷¹ In *AM(ON)* Justice Christie similarly concludes that "it is not the timing of these applications, but rather the requirement for the application itself that achieves the[] purposes and objectives" of the legislation.¹⁷² This is not correct.

¹⁶⁸ *ARS*, *supra* note 7 at para 37; *JJ*, *supra* note 3; *AM (ON)*, *supra* note 7.

¹⁶⁹ *Supra* note 7 at para 94.

¹⁷⁰ *ARS*, *supra* note 7 at para 95 quoting *Shearing*, *supra* note 3 at para 110.

¹⁷¹ *ARS*, *supra* note 7 at para 96.

¹⁷² *Supra* note 7 at para 42.

The section 278.92 regime does establish threshold criteria for the admissibility of certain types of evidence. But the regime also attempts to protect the privacy, equality, and dignity interests of complainants, and the broader societal interest in encouraging reporting by treating complainants humanely, throughout the process. It does so by including certain procedural requirements with respect to sexual history evidence and private records. The 7 day notice provision is one example. As Justice Chapman notes in *MS*: “the reality of the historic disadvantage women and children have faced in seeking justice in cases of sexual abuse cannot be ignored and indeed further perpetrated through an evisceration of what is the obvious intent of Parliament – namely that, as much as possible, evidence of other sexual activity be vetted prior to trial.”¹⁷³

The notice provision is only one of the procedural protections not captured by the admissibility rules. For instance, a complainant is not (under the new regime nor was she under the prior provisions) compellable at a *voir dire* to determine the admissibility of evidence of her other sexual activity.¹⁷⁴ Similarly, hearings to determine section 276 applications are held *in camera* to preserve the complainant’s privacy should the application be dismissed.¹⁷⁵ Like the notice provision, these procedural rules aim to protect a complainant’s privacy, dignity and equality prior to the stage of the proceeding at which admissibility is determined. Contrary to Justice Breen’s conclusion, the complainant’s privacy, dignity and equality interests are not “fully protected”¹⁷⁶ by the judicial determination to admit or exclude evidence of her other sexual activity or private records.

The requirement that applications be brought prior to trial protects the dignity, equality and privacy interests of complainants and promotes a humane process in several ways. Consider the following three: 1) the notice provision enables Crowns to properly prepare these vulnerable witnesses; 2) it avoids bifurcated proceedings which can cause complainants an undue amount of stress and hardship and; 3) it enables complainants to make an informed decision about whether to participate in a potentially traumatic legal proceeding. All three of these protections engage the equality, privacy and dignity interests of sexual assault survivors. None of them are achieved by the admissibility decision.

1. A fair trial requires that Crowns perform their duty to properly consult and prepare vulnerable witnesses such as sexual assault complainants

In *R v Darrach* the Supreme Court of Canada determined that accused individuals who sought to rely upon evidence of a complainant’s other sexual activity to defend themselves against sexual assault allegations “could not do so in such a way as to surprise the complainant”.¹⁷⁷

¹⁷³ *Supra* note 9 at para 92

¹⁷⁴ *Criminal Code*, *supra* note 2, section 278.94(2).

¹⁷⁵ *Ibid*, section 278.94(1).

¹⁷⁶ *ARS supra* note 7 at para 91.

¹⁷⁷ *Darrach*, *supra* note 29 at para 55.

Defence counsel's argument that the requirement that the accused disclose this aspect of his defence violated the *Charter* because "the element of surprise was essential to his cross-examination" was rejected.¹⁷⁸ In arriving at this conclusion the Court in *Darrach* expressly contemplated that the Crown would consult with complainants on section 276 applications.¹⁷⁹

For Crowns to properly consult with complainants on a section 278.92 application, the application must be brought before the complainant testifies. Rules of professional conduct prohibit Crowns from communicating with a complainant during cross-examination. As Justice Chapman notes in *R v MS*: "[p]resumably the Supreme Court in *Darrach*, in approving of the Crown's ability to consult with the complainant concerning the contents of the [accused's] affidavit, was not suggesting it was appropriate to do so while she is under cross-examination by defence counsel."¹⁸⁰ In addition, while not explicitly precluded from doing so by rules of professional conduct, some Crown Attorneys may be wary of consulting with a complainant after she has taken her oath. In other words, some Crowns may be unwilling to consult with a complainant even during direct examination or after direct is finished but before cross-examination has begun. Routinely permitting section 278.92 applications after the complainant has begun testifying will preclude the ability of the Crown to consult with the complainant.¹⁸¹

In addition to inhibiting the Crown's ability to respond properly to the application by consulting with the complainant, precluding the ability of the Crown to consult with complainants on these applications adversely impacts the dignity and equality interests of complainants by impeding preparation of the complainant for trial. In *Darrach* the Supreme Court noted the trial judge's comment that: "part of the purpose of the section 276.1 proceeding was to prepare the witness for a potential intrusion into her privacy."¹⁸² This is also part of the purpose under the new regime.

¹⁷⁸ *Ibid* at para 9, 55.

¹⁷⁹ *Darrach*, *supra* note 29 at para 55. In *R v FA*, [2019] OJ No 3041 at para 67 Justice Caponecchia found no compelling reason why "defence disclosure of private records being adduced in evidence should be treated any differently than disclosure of someone's private sexual activity. Both pertain to sensitive information over which a complainant has a privacy interest."

¹⁸⁰ *MS*, *supra* note 9 at para 90.

¹⁸¹ In *Reddick*, *supra* note 7, Justice Akhtar, in striking down the regime, concludes that this consultation should not include providing the complainant with the application. It seems likely that, prior to the enactment of Bill C-51 some Crowns did provide complainants with the application and others did not. Justice Akhtar's reasoning on this point is difficult to understand. Whether complainants receive a physical copy of the application or are given a written or verbal summary of the evidence the defence seeks to admit is irrelevant. Moreover, Justice Akhtar's suggestion that Crowns ought not to explain to complainants the accused's argument on admissibility of the evidence, and his assertion that all the Court meant in *Darrach*, *supra* note 29 was that Crowns reveal the nature of the evidence to the complainant so that she is not ambushed with discriminatory evidence are specious. The Court in *Darrach* used the word "consult". The Court recognized that the Crown, in preparing its response to the admissibility argument, would consult with the complainant. This would, of course, in some cases necessitate explaining to her why defence counsel wanted to introduce the evidence.

¹⁸² *Supra* note 29 at p 453.

All witnesses require proper preparation. Given the granular degree to which sexual assault complainants are likely to be questioned, and the highly sensitive evidence at issue, Crown preparation may be even more important for these witnesses.¹⁸³ Part of that preparation includes consultation on section 276 applications. This would include, for example, explaining to complainants what a section 276 application is, what limits such evidence can be used for, and what to expect in terms of cross-examination on the specific evidence included in the application. While testifying as a sexual assault complainant is always likely to be a difficult and upsetting process, the trauma of the trial process can be mitigated by properly preparing complainants. Permitting accused individuals to routinely bring these applications during the trial will remove this protection for complainants.

One related point should be highlighted. In *Reddick* Justice Akhtar determines that the Court in *Darrach* did not envisage that complainants would have the right to retain counsel and receive privileged advice on the evidence sought to be adduced through a section 276 application.¹⁸⁴ He suggests that the new regime problematically denies the accused disclosure on the complainant's comments, reactions to, or explanation regarding the application because such communications will now be privileged. This is an unconvincing argument. First, complainants have always had the right to retain legal counsel. Communications between sexual assault complainants and their legal counsel, on any aspect of a case, have always been privileged. Second, and relatedly, whether a complainant retains a lawyer to advise her in the context of a sexual assault trial in which she serves as a witness, does not absolve the Crown of its duty to consult and prepare her – and any communications arising from these consultations and preparation will still be subject to the Crowns' disclosure obligations under *R v Stinchcombe*.¹⁸⁵

2. *Routinely Permitting Mid-trial Applications Will Result in Bifurcated Trials That Impose Significant Harms on Complainants*

Several courts have recognized the procedural delays which would arise if accused individuals were routinely permitted to bring section 278.92 applications mid-proceeding.¹⁸⁶ Justice Akhtar explained the substantial procedural issues that would arise:

The trial would necessarily be halted to allow the disclosure of the records. Counsel for the complainant would have to be retained, meet with the complainant, prepare a response, file materials, and argue the matter in front of the trial judge. This could conceivably delay the trial for weeks if not months. Such methods would be unworkable in a jury trial.¹⁸⁷

¹⁸³ I explained and supported this assertion in Elaine Craig, *Putting Trials on Trial: Sexual Assault and the Failure of the Legal Profession*, (McGill-Queens University Press: Montreal, 2018) Chapter 5.

¹⁸⁴ *Supra* note 7 at para 62 – 66.

¹⁸⁵ See *R v AM*, 2020 ONSC 8061 at para 88.

¹⁸⁶ *FA*, *supra* note 179 at para 62; *MS*, *supra* note 9.

¹⁸⁷ *Reddick*, *supra* note 7 at para 72. To be clear, Justice Akhtar, found that the section 278.92 regime was unconstitutional. While he accepted that the 7 day notice period for section 276 applications was necessary, he struck

As Justice Chapman observes in *MS*, “[r]ealistically this would mean that many sexual assault trials will take place on a bifurcated basis.”¹⁸⁸ This would impose two types of burdens on complainants. Most acutely, it would require them to remain under oath for days, weeks or months while the application is addressed. More generally, delay in sexual assault proceedings adversely impacts the life circumstances of accused individuals, complainants, and the friends and family of both.

While complainants in criminal proceedings do not share the accused’s right to a timely trial, there is nevertheless a timing related equality interest that must be considered in assessing the constitutionality of the requirement that section 278.92 applications be brought prior to trial whenever possible. Indeed, the implications of a bifurcated proceeding on the complainant’s equality interests are grave. A bifurcated proceeding in which a sexual assault complainant’s testimony is paused while an accused brings an application to introduce evidence of her other sexual activity, or her private records, will in some cases force complainants to remain under oath for weeks or months. Consider the possible implications for a sexual assault survivor. For weeks or months she will be unable to discuss with a therapist or loved ones her thoughts, reactions to, and feelings about the questions she was required to answer during her testimony. She will endure the physical and psychological stress of readying herself to testify in a sexual assault proceeding not once but twice. She will be unable to ask any questions of the Crown during these weeks and months of waiting. Crowns may be hesitant to communicate at all with the complainant - or will be inclined to limit themselves to written communication regarding procedural issues such as the date of the complainant’s next appearance in court. Imagine the impact that this lack of communication could have on complainants whose living conditions, mental health, or employment are unstable. Allowing sexual assault trials to be bifurcated in this manner is certain to disproportionately harm sexual assault complainants who are marginalized on the basis of race, Indigeneity, income and/or disability.

In addition to the specific harms that will be imposed because complainants will be ‘hung up in their oaths’, the interruption caused by a bifurcated proceeding will impose the types of general harms always caused by delayed justice. In *R v Jordan*, the Supreme Court of Canada acknowledged the harm caused to all participants in a criminal proceeding when a resolution is delayed.¹⁸⁹ The Court recognized that “[v]ictims and their families, who in many cases have suffered tragic losses, cannot move forward with their lives” until the case is resolved.¹⁹⁰ It is not uncommon for survivors of sexualized violence to delay obtaining counselling, pursuing education, or dating until after they have ‘gotten through the trial’. Given the scarcity of judicial and court resources and the competing time demands on practicing lawyers, interrupting a

down the provisions granting complainants standing at the admissibility *voir dire* (and thus by implication disclosure of the application), as well as the limits on the admissibility of other types of records in the possession of the accused.

¹⁸⁸ *Supra* note 9 at para 97.

¹⁸⁹ 2016 SCC 27 at para 2-3.

¹⁹⁰ *Ibid* at para 2.

complainant's testimony in order to bring a section 278.92 application is certain to extend this difficult process for complainants by weeks, if not months.

As Justice Chapman notes, the prospect of mid-trial applications "will likely have a very real adverse impact on a complainant's decision as to whether or not she wants to dispute the admission of her sexual history evidence thus necessitating the agony of ongoing proceedings."¹⁹¹ Put most starkly, these mid-trial applications will force women to choose between "availing themselves of their equality rights" and enduring the consequence, or "giv[ing] up on those rights altogether".¹⁹² The *Charter* analysis in lower court decisions in cases like *ARS* and *JJ*, which 'read down' Parliament's requirement of a 7 day notice period, failed to include an assessment of these impacts on the equality interests of complainants.

3. *Equal protection of the law demands that, to the extent possible, complainants have the ability to make an informed decision about whether to participate in a potentially traumatic legal proceeding*

One of the dignity and equality interests served by the section 278.92 regime, and in particular the requirement that an application be brought prior to trial, is that it gives sexual assault survivors the ability to make an informed choice about whether they want to serve as a complainant in a sexual assault trial. While it is true that individuals can be compelled to serve as complainants in criminal proceedings, many prosecutors take the policy position that, as a general matter, sexual assault victims ought not to be compelled to participate. As Justice Karakatsanis observed in *R v RV*: "[t]estifying in a sexual assault case can be traumatizing and harmful to complainants."¹⁹³ Complainants should, to the extent possible, have the ability to make the difficult decision to undergo this often harmful and traumatizing experience in an informed manner. As Justice Chapman noted in *R v MS* in explaining the advantages of requiring that section 276 applications be brought pre-trial:

¹⁹¹ *MS*, *supra* note 9 at para 106.

¹⁹² *Ibid.* In *AM (ON)*, *supra* note 7 at para 89 Justice Christie responds to this concern by arguing that "this could equally be said of the pre-trial process, that complainants may not want to be involved and, therefore, give up on those rights altogether". With respect, his response misses the point made by Justice Chapman. Presumably, her point was that a mid-trial application and the resulting bifurcated proceeding *adds* to the burdens born by a sexual assault complainant.

¹⁹³ 2019 SCC 41 at para 33. See also Elizabeth Sheehy, ed, *Sexual Assault in Canada: Law, Legal Practice and Women's Activism*, (Ottawa: University of Ottawa Press, 2012); Cheryl Regehr, Ramona Alaggia, Liz Lambert, & Michael Saini, "Victims of Sexual Violence in the Canadian Criminal Courts" (2008) 3 Victims and Offenders 99; Mary Ross, "Restoring Rape Survivors: Justice, Advocacy, and a Call to Action" (2006) 1087 Annals of the New York Academy of Sciences 206 at 218 – 222; Cheryl Regehr & Ramona Alaggia, "Perspectives of Justice for Victims of Sexual Violence" (2006) 1:1 Victims & Offenders 33.

one incidental benefit of the notice requirements is that complainants can make an informed decision as to whether or not they wish to take part in a trial...It may well make a difference to a complainant if she is not only being made to testify to events that are the subject of the charge but also, for example, the sexual abuse she experienced at the hands of her father.¹⁹⁴

The same may be true with respect to evidence that does not fall within the scope of section 276 but that is contained in a record in the accused's possession in which she has a reasonable expectation of privacy. For example, a sexual assault complainant's decision to be a part of a criminal trial might be influenced by whether she will be confronted with records revealing details about her eating disorder, that she stole from her parents, or about her multiple suicide attempts.

Sexual assault is “not like any other crime”¹⁹⁵ and sexual assault trials are unlike most other types of criminal proceedings. The vulnerability of complaining witnesses in sexual assault proceedings, coupled with the need to ensure that an individual accused of a sexual offence has the proper latitude to rigorously test the Crown's evidence including that of the complainant, necessitates granting complainants the ability, whenever possible, to make an informed decision about whether to undergo the difficult and often traumatic experience of cross-examination. This is a matter of equal protection under the law.

IV. Conclusion

Were it true that a complainant's advance knowledge of aspects of the accused's trial plan by definition, or automatically, “eviscerated” or rendered “meaningless” his right to cross-examination it would be impossible to hold a constitutionally sound re-trial following an appeal or mistrial. It would mean that the unsuccessful *Charter* challenges to the section 276 regime¹⁹⁶ and the third-party records regime¹⁹⁷ in the 1990s and early 2000s were wrongly decided. It would put into question advance disclosure obligations with respect to the defence of alibi. That is not to suggest that the reality of these other contexts in which advance knowledge occurs means that

¹⁹⁴ *Supra* note 9 at para 92. In *AM (ON)*, *supra* note 7 Justice Christie responds to this argument by asserting that a complainant can still make an informed decision because defence counsel can be expected to notify the court at the pre-trial conference that he or she anticipates a section 276 application – that knowledge that such an application may or will be brought is sufficient for complainants to make an informed decision in advance of trial as to whether to voluntarily participate. This is not a compelling argument. There is no reason to assume that complainants will be able to guess what evidence the defence seeks to adduce. Indeed, most of the *Charter* challenges to the new regime are premised on the assertion that the element of surprise is fundamental to defence counsel's ability to properly cross-examine the complainant. Moreover, the anguish caused to complainants who are put on notice that the accused will seek to introduce evidence of their other sexual activity or of their private records but not told what private records or which sexual activities is sure to discourage survivors from turning to the legal system to respond to their experiences of sexual violation.

¹⁹⁵ *Seaboyer*, *supra* note 153 at 648.

¹⁹⁶ *Darrach*, *supra* note 29.

¹⁹⁷ *Mills*, *supra* note 150.

it is constitutional in this context.¹⁹⁸ The pertinent question, in assessing the constitutionality of the section 278.92 regime, is whether the limits that this will place on an accused's right to full answer and defence are contrary to the principles of fundamental justice. This requires identifying, with precision, what these limits actually are in practice and then balancing them with the other protected interests legislated under the regime. This was not done properly in cases like *ARS*, *JJ*, *Reddick*, *Anderson*, *DLB* and *AM*.¹⁹⁹

¹⁹⁸ This point is made in both *ARS*, *supra* note 7 and *JJ*, *supra* note 5. Notably, the Ontario Court of Appeal relied upon precisely this type of reasoning in *R v Darrach* (1998), 38 OR (3d) 1 to uphold advance disclosure under the section 276 regime.

¹⁹⁹ *Supra* note 7.